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FUR-SEAL ARBITRATION.

ARGUMENT

OF

THE UNITED STATES

BEFORE THE

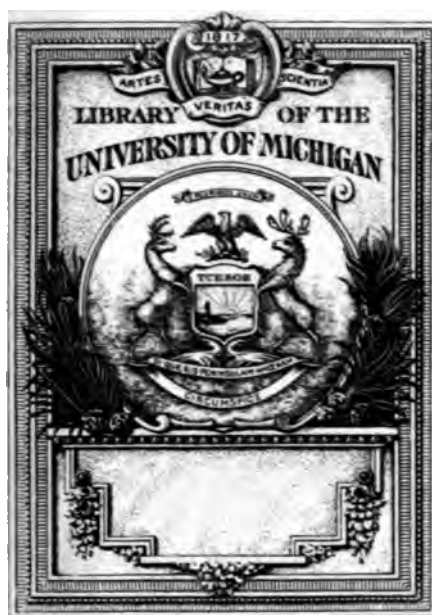
TRIBUNAL OF ARBITRATION

CONVENED AT PARIS

UNDER THE

PROVISIONS OF THE TREATY BETWEEN THE UNITED
STATES OF AMERICA AND GREAT BRITAIN,
CONCLUDED FEBRUARY 29, 1892.

WASHINGTON, D. C.:
GOVERNMENT PRINTING OFFICE.
1893.



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WASHINGTON, *February 23, 1893.*

SIR: We have the honor to hand you herewith the argument prepared by us as counsel of the United States, in order that in pursuance of Article V of the treaty between the United States and Great Britain, of 29th February, 1892, it may be presented to the Tribunal of Arbitration constituted by that treaty.

Very respectfully, your obedient servants,

E. J. PHELPS.

J. C. CARTER.

H. M. BLODGETT.

F. R. COUDERT.

HON. JOHN W. FOSTER,

Agent of the United States.

▼

ARGUMENT OF THE UNITED STATES.

The undersigned, counsel for the United States, conceive that before entering upon the argument which it has been made their duty to prepare, they owe more than a formal and ceremonious expression of their sense of the importance and dignity of the occasion and of the august character of the Tribunal which they are to address. Instances have heretofore occurred in which nations have submitted their controversies to peaceful arbitration; but the most important of them have been cases in which mere pecuniary reparation was sought in respect to acts which could not be recalled. To-day two most powerful nations agree that their conflicting claims to permanent dominion shall be reconciled and determined without a resort to those methods of violence which carry with them such limitless destruction and suffering. A just homage is thus paid to the civilized sentiment of mankind that war is seldom, if ever, necessary; and that the conclusions of reason should be made to supersede the employment of force.

FIRST.

WHAT LAW IS TO GOVERN THE DECISION?

The undersigned believe it to be in a high degree important that it should at the outset be clearly understood what principles and rules are to guide the Arbitrators in reaching their conclusions. Otherwise no argument can be intelligently framed. We do not indeed apprehend that there can be any serious difference of opinion upon this point.

The consciousness and immediate conviction of every one having any part in the proceeding—Arbitrators and counsel alike—might be safely

appealed to for the response that the determination must be grounded upon principles of *right*. It can not be that two great nations have voluntarily waived their own convictions and submitted their rival claims to the determinations of caprice, or merely temporary expediency. It is not to such empty and shifty expedients that national pride and power have paid their homage. The arbitrament of force can be worthily replaced only by that of *right*. This Tribunal would be robbed of its supreme dignity, and its judgment would lose its value, if its deliberations should be swayed in any degree by considerations other than those of justice. Its proceedings would no longer be judicial. The nation for which the undersigned have the honor to be retained is prepared to accept and abide by any determination which this Tribunal may declare as the just conclusion of law upon the facts as established by the proofs. It can not be content with any other.

But what is the rule or principle of *right*? How is it to be described and where is it to be found? The answer to this question, though not so immediately obvious, is yet not open to doubt. In saying that the rule must be that of right, it is intended, and indeed declared, that it must be a *moral* rule, a rule dictated by the moral sense; but this may not be the moral sense as found in any individual mind, or as exhibited by the concurring sentiments of the people of any particular nation. There may be—there are—differences in the moral convictions of the people of different nations, and what is peculiar to one nation can not be asserted as the rule by which the conduct of another nation is to be controlled. The controversy to be determined arises between two different nations, and it has been submitted to the judgment of a tribunal composed, in part, of the citizens of several other nations. It is immediately obvious that it must be adjudged upon principles and rules which both nations and all the Arbitrators alike acknowledge; that is to say, those which are dictated by that *general standard of justice* upon which civilized nations are agreed; and this is *international law*. Just as, in municipal societies, municipal law, aside from legislative enactments, is to be found in the general standard of justice which is acknowledged by the members of each particular state, so, in the larger society of nations, international law is to be found in the general standard of justice acknowledged by the members of that society. There is, indeed, no *legislation*, in the ordinary sense of that word, for the society of nations; nor in respect to, by far, the larger part of the affairs of life is there any for municipal societies; and yet there is

for the latter an always existing *law* by which every controversy may be determined. The only difference exhibited by the former is that it has no regularly-constituted body of *experts*, called judges, clothed with authority to declare the law. And this distinction is wiped away in the case of the present controversy by the constitution of this tribunal. That there is an *international law* by which every controversy between nations may be adjudged and determined will scarcely be questioned anywhere; but here no such questioning is allowable. The parties to the controversy are, to employ a word familiar to them, *estopped* from raising it. They have voluntarily made themselves parties to a *judicial* proceeding. For what purpose is it that these nations have submitted rival claims to *judicial* decision if there is no legal rule which governs them? Why is it that they have provided for the selection of arbitrators preëminent for their knowledge of law, except that they intended that the law should determine their rival claims? Nay, what is the relevancy, or utility, of this very argument in which we are engaged unless there is an agreed standard of justice to which counsel can appeal and upon which they can hope to convince? The undersigned conceive that it will not be disputed that this arbitration was planned and must be conducted upon the assumption that there is no place upon the earth, and no transaction either of men or nations which is not subject to the dominion of law.

Nor can there be any substantial difference of opinion concerning the sources to which we are to look for the international standard of justice which the undersigned have referred to as but another name for international law. Municipal and international law flow equally from the same source. All law, whether it be that which governs the conduct of nations, or of individuals, is but a part of the great domain of ethics. It is founded, in each case, upon the nature of man and the environment in which he is placed. The formal rules may indeed be varied according to the differing conditions for which they are framed, but the spirit and essence are everywhere and always the same. Says Sir James Mackintosh:

The science which teaches the rights and duties of men and of states has in modern times been styled "the law of nature and nations." Under this comprehensive title are included the rules of morality, as they prescribe the conduct of private men towards each other in all the various relations of human life; as they regulate both the obedience of citizens to the laws, and the authority of the magistrate in framing laws and administering government; and as they modify the intercourse of independent commonwealths in peace and prescribe limits to their hostility

in war. This important science comprehends only that part of private ethics which is capable of being reduced to fixed and general rules.¹

And Lord Bacon has, in language often quoted, pointed to the law of nature as the source of all human jurisprudence:

For there are in nature certain fountains of justice, whence all civil laws are derived but as streams, and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountain.²

This original and universal source of all law is variously designated by different writers; sometimes as "the law of nature," sometimes as "natural justice," sometimes as "the dictates of right reason;" but, however described, the same thing is intended. "The law of nature" is the most approved and widely employed term. The universal obligation which it imposes is declared by Cicero in a passage of lofty eloquence which has been the admiration of jurists in every succeeding age.³

And the same doctrine is inculcated by the great teacher of the laws of England in language which may have been borrowed from the great Roman:

This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over the globe, in all countries, and at all times; no human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.⁴

The dependency of all law upon the law of nature is happily expressed by Cicero in another often quoted passage: "*Lex est suprema ratio insita a natura quæ jubet ea quæ facienda sunt, prohibetque con-*

¹ Dissertation on the Law of Nature and Nations.

² De Augmentis Scientiarum.

³ "Est quidem vera lex recta ratio naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat, quæ tamen neque probos frustra jubet aut vetat, nec improbos jubendo aut vetando movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres ejus alius, nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit unusquisque erit communis quasi magister et imperator omnium deus: ille legis hujus inventor, disceptator, lator, cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiam si caetera supplicia quæ putantur, effugerit." (De Republica, Lib. III. Cap. XXII, § 33.)

⁴ Blackstone, Com., Book I, p. 41.

traria."¹ And it is very clearly illustrated by the fact that the great expositors of the Roman law in seeking for a concise formula which would express its original and fundamental principles, have simply borrowed or framed a statement of the dictates of natural justice: "*Juris precepta sunt hæc: honesta vivere, alterum non lædere, suum cuique tribuere.*"²

Some writers have been inclined to question the propriety of designating as law that body of principles and rules which it is asserted are binding upon nations, for the reason that there is no common superior power which may be appealed to for their enforcement. But this is a superficial view which has received no considerable assent. The public opinion of the civilized world is a power to which all nations are forced to submit. No nation can afford to take up arms in defence of an assertion which is pronounced by that opinion to be erroneous. A recent writer of established authority has well answered this objection:

It is sometimes said that there can be no law between nations, because they acknowledge no common superior authority, no international executive capable of enforcing the precepts of international law. This objection admits of various answers: First, it is a matter of fact that states and nations recognize the existence and independence of each other, and out of a recognized society of nations, as out of a society of individuals, law must necessarily spring. The common rules of right approved by nations as regulating their intercourse are of themselves, as has been shown, such a law. Secondly, the contrary position confounds two distinct things, namely, the physical sanction which law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of right; the error is similar in kind to that which has led jurists to divide moral obligations into perfect and imperfect. All moral obligations are equally perfect, though the means of compelling their performance is, humanly speaking, more or less perfect, as they more or less fall under the cognizance of human law. In like manner, international justice would not be less deserving of that appellation if the sanctions of it were wholly incapable of being enforced.

But irrespectively of any such means of enforcement the law must remain. God has willed the society of States as He has willed the society of individuals. The dictates of the conscience of both may be violated on earth, but to the national as to the individual conscience, the language of a profound philosopher is applicable: "Had it strength as it had right, had it power as it has manifest authority, it would absolutely govern the world."

Lastly, it may be observed on this head, that the history of the world, and especially of modern times, has been but incuriously and unprofitably read by him who has not perceived the certain Nemesis which overtakes the transgressors of international justice; for, to take

¹ Cic. De Legibus, Lib. I, c. VI, § 6.

² Just. I, 1. 3.

but one instance, what an "Iliad of woes" did the precedent of the first partition of Poland open to the kingdoms who participated in that grievous infraction of international law! The Roman law nobly expresses a great moral truth in the maxim, "*Jurisjurandi contempta religio satis Deum habet ultorem.*" The commentary of a wise and learned French jurist upon these words is remarkable and may not inaptly close this first part of the work: "*Paroles (he says) qu'on peut appliquer également à toute infraction des loix naturelles. La justice de l'Auteur de ces loix n'est pas moins armée contre ceux qui les transgressent que contre les violateurs du serment, qui n'ajoute rien à l'obligation de les observer, ni à la force de nos engagements, et qui ne sert qu'à nous rappeler le souvenir de cette justice inexorable.*" (Phillimore's *International Law*, third edition, London, 1879, vol. I, section LX.)¹

That there is a measure of uncertainty concerning the precepts of the law of nature and, consequently, in international law which is derived from it, is indeed true. This uncertainty in a greater or less degree is found in all the moral sciences. It is exhibited in municipal law, although not to so large an extent as in international law. Law is matter of opinion; and this differs in different countries and in different ages, and indeed between different minds in the same country and at the same time. The loftiest precepts of natural justice taught by the most elevated and refined intelligence of an age may not be acquiesced in or appreciated by the majority of men. It is thus that the rules actually enforced by municipal law often fall short of the highest standard of natural justice. Erroneous decisions in municipal tribunals are of frequent occurrence. Such decisions, although erroneous, must necessarily be accepted as declarative of the rule of justice. They represent the

¹The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of states are all parts of one consistent system of universal morality. Between the most abstract and elementary maxims of moral philosophy and the most complicated controversies of civil and public law there subsists a connection. The principle of justice deeply rooted in the nature and interests of man pervades the whole system and is discoverable in every part of it, even to the minutest ramification in a legal formality or in the construction of an article in a treaty.—(Sir James Macintosh, *Discourse on the Law of Nature and Nations*, *sub fine*.)

Mr. Justice Story says: "The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return." (*Conflict of Laws*, ch. ii. sec. 35.)

And, sitting as a judge, he declared: "But I think it may be unequivocally affirmed that every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations and the nature of moral obligations may theoretically be said to exist in the law of nations; and, unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and custom, it may be enforced by a court of justice wherever it arises in judgment." (*La Jeune Eugénie*, 2 *Mason's Reports*, p. 449.)

national standard of justice accepted and adopted in states where they are pronounced. So far as they are wrong they will ultimately be corrected as nearer approaches are made to the truth. So also in international law, the actual practice of nations does not always conform to the elevated precepts of the law of nature. In such cases, however, the actual practice must be accepted as the rule. It is this which exhibits what may be called the international standard of justice; that is to say, that standard upon which the nations of the world are agreed. As municipal law embraces so much of natural justice, or the law of nature, as the municipal society recognizes and enforces upon its members, so, on the other hand, international law embraces so much of the same law of nature as the society of nations recognizes and enforces upon its members in their relations with each other. The Supreme Court of the United States, speaking through its greatest Chief Justice, was obliged to declare in a celebrated case that slavery, though contrary to the law of nature, was not contrary to the law of nations; and an English judge, no less illustrious, was obliged to make a like declaration.¹ Perhaps the same question would in the present more humane time be otherwise determined.

But, although the actual practice and usages of nations are the best evidence of what is agreed upon as the law of nations, it is not the only evidence. These prove what nations have *in fact* agreed to as binding law. But, in the absence of evidence to the contrary, nations are to be *presumed* to agree upon what natural and universal justice dictates. It is upon the basis of this presumption that municipal law is from time to time developed and enlarged by the decisions of judicial tribunals and jurists which make up the unwritten municipal jurisprudence. Sovereign states are presumed to have sanctioned as law the general principles of justice, and this constitutes the authority of municipal tribunals to declare the law in cases where legislation is silent. They are not to conclude that no law exists in any particular case because it has not been provided for in positive legislation. So also in international law, if a case arises for which the practice and usages of nations have furnished no rule, an international tribunal like the present is not to infer that no rule exists. The consent of nations is to be presumed in favor of the dictates of natural justice, and that source never fails to supply a rule.

If the foregoing observations are well founded, the law by which this

¹The Antelope 10, Wheaton's Reports, p. 120; The Louis, 2 Dods, 238.

Tribunal is to be guided is the law of nations; and the sources to which we are to look for that law upon any question which may arise are these:

First. The actual practice and usages of nations. These are to be learned from history in the modes in which their relations and intercourse with one another are conducted; in the acts commonly done by them without objection from other nations; in the treaties which they make with each other, although these are to be viewed with circumspection as being based often upon temporary and shifting considerations, and sometimes exacted by the more powerful from the weaker states; and in their diplomatic correspondence with each other, in which supposed principles of the law of nations are invoked and acceded to.

Second. The judgments of the courts which profess to declare and administer the law of nations, such as prize courts and, in some instances, courts of admiralty, furnish another means of instruction.

Third. Where the above mentioned sources fail to furnish any rule resort is to be had to the great source from which all law flows, the dictates of right reason, natural justice; in other words, the law of nature.

Fourth. And in ascertaining what the law of nature is upon any particular question, the municipal law of States, so far as it speaks with a concurring voice, is a prime fountain of knowledge. This is for the reason that that law involves the law of nature in nearly every conceivable way in which it speaks, and has been so assiduously cultivated by the study of ages that few questions concerning right and justice among men or nations can be found for which it does not furnish a solution.

Fifth. And, finally, in all cases, the concurring authority of jurists of established reputation who have made the law of nature and nations a study is entitled to respect.

Mr. Chief Justice Marshall has expressed from the bench of the Supreme Court of the United States what we conceive to be the true rule. He says:

The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten we recur to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, rendered fixed and stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received

not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.¹

JAMES C. CARTER.

¹Sixty Hogsheads of Sugar v. Boyle, 9 Cranch, 191, 197.

The views stated in the text concerning the foundation of the law of nations and the sources from which it is to be gathered, are, it is believed, supported by the concurrent voices of writers of established authority. Differences will be found in the modes of statement; but there seems to be no substantial disagreement. A collection of extracts from many writers of different nations will be found in the Appendix immediately following.

APPENDIX TO PART FIRST (MR. CARTER'S ARGUMENT).

CITATIONS FROM WRITERS UPON THE LAW OF NATURE AND NATIONS, SHOWING THE FOUNDATION OF INTERNATIONAL LAW, ITS RELATIONS TO THE LAW OF NATURE, AND THE SOURCES FROM WHICH THE KNOWLEDGE OF IT IS TO BE DERIVED.

[POMEROY. Lectures on International Law, ed., 1886., ch. I, secs. 29, 30, 31, 33, pages 23-26.]

SEC. 29. (2) A large number of rules which govern the mutual relations of states in their corporate capacity are properly called *international law*, on account of the objects which they subserve and the rights and duties they create. They are also properly *law*, because they have been established by particular states as a part of their own municipal systems, and are enforced by their judiciary and executive in the same manner as other portions of the local codes. They are in fact principles of the law of nature or morality put in the form of human commands, and clothed with a human sanction.

(3) What is called international law in its general sense, I would term international morality. It consists of those rules founded upon justice and equity, and deduced by right reason, according to which independent states are accustomed to regulate their mutual intercourse, and to which they conform their mutual relations. These rules have no binding force in themselves as law; but states are more and more impelled to observe them by a deference to the general public opinion of Christendom, by a conviction that they are right in themselves, or at least expedient, or by a fear of provoking hostilities. This moral sanction is so strong and is so constantly increasing in its power and effect, that we may with propriety say these rules create rights and corresponding duties which belong to and devolve upon independent states in their corporate political capacities.

SEC. 30. We thus reach the conclusion that a large portion of international law is rather a branch of ethics than of positive human jurisprudence. This fact, however, affords no ground for the jurist or the student of jurisprudence to neglect the science. Indeed, there is the greater advantage in its study. Its rules are based upon abstract justice; they are in conformity with the deductions of right reason; having no positive human sanction they appeal to a higher sanction than do the precepts of municipal codes. All these features clothe them with a nobler character than that of the ordinary civil jurisprudence, as God's law is more perfect than human legislation.

SEC. 31. The preceding analysis of the nature and characteristics of international law enables us to answer the general question, What are its sources? If we confine our attention to that portion which is in every sense of the term strictly international, and is therefore, as we have seen, morality rather than law, these sources are plainly seen to be: (1) The Divine law; (2) Enlightened reason acting upon the abstract principles of ethics; and (3) The consent of nations in adopting the particular rules thus drawn from the generalities of the moral law

by the aid of right reason. It is only with this portion of international law that we need now concern ourselves. That other portion which I have already described as international only in its objects, and strictly national and municipal in its creation and sanctions, springs from the same sources whence all of the internal law of a particular State arises—from legislatures and the decisions of courts. We will then briefly consider these principal sources, or, if I may use the expression, fountains from which flow the streams of the *jus inter gentes*.

SEC. 33. (2) *Reason*. But the precepts of the moral law, either as contained in the written word, or as felt in the consciousness of the human race, are statements of broad, general principles; they are the germs, the fructifying powers; they must be developed, must be cast in a more practical and dogmatic form to meet the countless demands of each individual, and of the societies we call nations. To this end we must appeal to reason; and hence the second source which I have mentioned, namely, enlightened reason acting upon the abstract principles of morality. I can not now stop to illustrate this proposition; we shall meet many pertinent examples in the course of our investigations. I wish now, however, to dwell upon one fact of great importance—a fact which will help you to avoid many difficulties, to reconcile many discrepancies, to solve many uncertainties. This fact is, that an international law is mainly based upon the general principles of pure morality, and as its particular rules are mainly drawn therefrom, or are intended to be drawn therefrom, by reason, it is, as a science, the most progressive of any department of jurisprudence or legislation. The improvement of civilized nations in culture and refinement, the more complete understanding of rights and duties, the growing appreciation of the truth that what is right is also expedient, have told, and still do tell, upon it with sudden and surprising effect.

The result is that doctrines which were universally received a generation since are as universally rejected now; that precedents which were universally considered as binding a quarter of a century ago would at the present be passed by as without force, as acts which could not endure the light of more modern investigation. More particularly is this true in respect to the rules which define the rights of belligerents and neutrals. The latest works of European jurists are, as we shall see, conceived in a far different spirit from standard treatises of the former generation. It was the entire ignoring or forgetfulness of this evident and most benign fact by Mr. Senator Sumner, in the celebrated and elaborate speech which he delivered a few years since upon the international policy of England, that rendered the speech utterly useless as an argument, exposed it to the criticism of European jurists, and left it only a monument of unnecessary labor in raking up old precedents from history, which no civilized nation of our own day would quote or rely upon.

The Roman law, that wonderful result of reason working upon a basis of abstract right, is largely appealed to in international discussions, as containing rules which, at least by analogy, may serve to settle international disputes. No one can be an accomplished diplomatist without a familiar acquaintance with much of this immortal code.

[Phillimore. International law, 1871, ch. III, pages 14–28.]

XIX. * * * What are in fact the fountains of international jurisprudence?" * * *

XX. Grotius enumerates these sources as being "*ipsa natura, leges divinas, mores, et pacta*."

In 1753 the British Government made an answer to a memorial of the Prussian Government which was termed by Montesquieu *réponse sans réplique*, and which has been generally recognized as one of the ablest expositions of international law ever embodied in a state paper. In this memorable document "The Law of Nations" is said to be founded upon justice, equity, convenience, and the reason of the thing and confirmed by long usage.

XXI. These two statements may be said to embrace the substance of all that can be said on this subject. * * *

XXII. Moral persons are governed partly by Divine law, * * * which includes natural law—partly, by positive instituted human law. * * *

States, it has been said, are reciprocally recognized as moral persons. States are therefore governed, in their mutual relations, partly by Divine and partly by positive law. Divine law is either (1) that which is written by the finger of God on the heart of man, when it is called natural law; or (2) that which has been miraculously made known to him. * * *

XXIII. The primary source, then, of international jurisprudence is Divine law.

XXVI. * * * Cicero maintains that God has given to all men conscience and intellect; that where these exist, a law exists, of which all men are common subjects. Where there is a *common law*, he argues, there is a *common right*, binding more closely and visibly upon the members of each separate state, but so knitting together the universe, "*ut iam universus hic mundus una civitas sit, communis Deorum atque hominum existimanda.*"

That law, this great jurist says, is immortal and unalterable by prince or people. * * *

XXXI. This would be called by many who have of late years written on the science, international *morality*; they would restrict the term *law* absolutely and entirely to the treaties, the customs, and the practice of nations.

If this were a mere question as to the theoretical arrangement of the subject of international law, it would be of but little importance.

* * * But it is of great practical importance to mark the subordination of the law derived from the consent of states to the law derived from God.

XXXII. * * * Another practical consequence is that the law derived from the consent of Christian states is restricted in its operation by the divine law; and just as it is not morally competent to any individual state to make laws which are at variance with the law of God, whether natural or revealed, so neither is it morally competent to any assemblage of states to make treaties or adopt customs which contravene that law.

Positive law, whether national or international, being only declaratory, may add to, but can not take from, the prohibitions of divine law. "*Civilis ratio civilia quidem jura corrumpere potest, naturalia non utique,*" is the language of Roman law; and is in harmony with the voice of international jurisprudence as uttered by Wolff: "*Absit vero, ut existimes, jus gentium voluntarium ab earum voluntate ita profiscisci, ut libera sit earum in eodem condendo voluntas, et stet pro ratione sola voluntas, nulla habita ratione juris naturalis.*"

XXXIII. This branch of the subject may be well concluded by the invocation of some high authorities from the jurisprudence of all countries in support of the foregoing opinion.

Grotius says emphatically: "*Nimirum humana jura MULTA constit-
uere possunt PRÆTER naturam, CONTRA nihil.*"

John Voet speaks with great energy to the same effect: "*Quod si
contra rectæ rationis dictamen gentes USU quædam introduxerint, NON ea
jus gentium rectè dixeris, SED PESSIMAM POTIUS MORUM HUMANI GEN-
ERIS CORRUPTELAM.*"

Suarez, who has discussed the philosophy of law in a chapter which
contains the germ of most that has been written upon the subject,
says: "*Leges autem ad jus gentium pertinentes veræ leges sunt, ut expli-
catum manet, propinquiore sunt legi naturali quam leges civiles, ideoque
impossibile est esse contrarias æquitati naturali.*"

Wolff, speaking of his own time, says: "*Omnium ferè animos occupavit
perversa illa opinio, QUASI FONS JURIS GENTIUM SIT UTILITAS PRO-
PRIA; undue contingit, id potentie cœquari. Damnamus hoc in privatis,
damnamus in rectore civitatis; sed ÆQUE IDEM DAMNANDUM EST IN
GENTIBUS.*"

Mackintosh nobly sums up this great argument: "The duties of men,
of subjects, of princes, of lawgivers, of magistrates, and of *states*, are
all parts of one consistent system of universal morality. Between the
most abstract and elementary maxim of moral philosophy, and the
most complicated controversies of civil or public law, there subsists a
connection. The principle of justice, deeply rooted in the nature and
interest of man, pervades the whole system, and is discoverable in every
part of it, even to its minutest ramification in a legal formality, or in
the construction of an article in a treaty."

[Henry Sumner Maine, *International Law*, pages 13-47.]

In modern days the name of International Law has been very much
confined to rules laid down by one particular class of writers. They
may be roughly said to begin in the first half of the seventeenth cen-
tury, and to run three parts through the eighteenth century. The
names which most of us know are, first of all that of the great Hugo
Grotius, followed by Puffendorf, Leibnitz, Zouch, Selden, Wolf, Bynker-
shoek, and Vattel. The list does not absolutely begin with Grotius,
nor does it exactly end with Vattel, and indeed, as regards the hither
end of this series the assumption is still made, and I think not quite
fortunately, that the race of law-creating jurists still exists. * * *
Their [the writers named and a few others] system is that convention-
ally known as International Law.

* * * * *

A great part, then, of International Law is Roman law spread over
Europe by a process exceedingly like that which a few centuries earlier
had caused other portions of Roman law to filter into the interstices of
every European legal system. The Roman element in International
Law belonged, however, to one special province of the Roman system,
that which the Romans themselves called natural law, or, by an alter-
native name, *Jus Gentium*. In a book published some years ago on
"*Ancient Law*" I made this remark: "Setting aside the Treaty Law of
Nations, it is surprising how large a part of the system is made up of
pure Roman law. Wherever there is a doctrine of the Roman juris-
consults affirmed by them to be in harmony with the *Jus Gentium*, the
Publicists have found a reason for borrowing it, however plainly it
may bear the mark of a distinctive Roman origin." * * *

Seen in the light of stoical doctrine the law of nations came to be
identified with the law of nature; that is to say, with a number of sup-

posed principles of conduct which man in society obeys simply because he is man. Thus the law of nature is simply the law of nations seen in the light of a peculiar theory. A passage in the Roman institutes shows that the expressions were practically convertible. The greatest function of the law of nature was discharged in giving birth to modern international law. * * *

The impression that the Roman law sustained a system of what would now be called international law, and that this system was identical with the law of nature had undoubtedly much influence in causing the rules of what the Romans called natural law to be engrafted on, and identified with, the modern law of nations (page 28).

It is only necessary to look at the earliest authorities on international law, in the "De Jure Belli et Pacis" of Grotius for example, to see that the law of nations is essentially a moral and, to some extent, a religious system. The appeal of Grotius is almost as frequent to morals and religion as to precedent, and no doubt it is these portions of the book * * * which gained for it much of the authority which it ultimately obtained. (Page 47.)

[From Wheaton, International Law, part I, ch. 1, secs. 4, 14.]

The principles and details of international morality, as distinguished from international law, are to be obtained not by applying to nations the rules which ought to govern the conduct of individuals, but by ascertaining what are the rules of international conduct which, on the whole, best promote the general happiness of mankind.

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.

[Kent's Commentaries, Part I, lect. 1, pages 2-4.]

* * * The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of divine revelation, as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature has been called by Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience.

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous suggestion that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns. States or bodies politic are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in pri-

vate life. The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce, and of a code of conventional or positive law.

In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations and the nature of moral obligation; and we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science.

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age and upon all mankind. * * *

[Halleck, *International Law*, ch. II, sec. 13, page 50, and sec. 18, page 54.]

SEC. 13. It is admitted by all that there is no universal or immutable law of nations, binding upon the whole human race, which all mankind in all ages and countries have recognized and obeyed. Nevertheless, there are certain principles of action, a certain distinction between right and wrong, between justice and injustice, a certain divine or natural law, or rule of right reason, which, in the words of Cicero, "is congenial to the feelings of nature, diffused among all men, uniform, eternal, commanding us to our duty, and prohibiting every violation of it; one eternal and immortal law, which can neither be repealed nor derogated from, addressing itself to all nations and all ages, deriving its authority from the common Sovereign of the universe, seeking no other lawgiver and interpreter, carrying home its sanctions to every breast, by the inevitable punishment He inflicts on its transgressors."

It is to these principles or rule of right, reason, or natural law, that all other laws, whether founded on custom or treaty, must be referred, and their binding force determined. If, in accordance with the spirit of this natural law, or if innocent in themselves, they are binding upon all who have adopted them; but if they are in violation of this law, and are unjust in their nature and effects, they are without force. The principles of natural justice, applied to the conduct of states, considered as moral beings, must therefore constitute the foundation upon which the customs, usages, and conventions of civilized and christian nations are erected into a grand and lofty temple. The character and durability of the structure must depend upon the skill of the architect and the nature of the materials; but the foundation is as broad as the principles of justice, and as immutable as the law of God.

SEC. 18. The first source from which are deduced the rules of conduct which ought to be observed between nations, is the *divine law*, or principle of justice, which has been defined "a constant and perpetual disposition to render every man his due." The peculiar nature of the society existing among independent states, renders it more difficult to apply this principle to them than to individual members of the same state; and there is, therefore, less uniformity of opinion with respect to the rules of international law properly deducible from it, than with respect to the rules of moral law governing the intercourse of individual men. It is, perhaps, more properly speaking, the test by which the rules of positive international law are to be judged, rather than the

source from which these rules themselves are deduced. (Justinian, *Institutes*, lib. 1, tit. 1; Phillimore, *On Int. Law*, Vol. I, sec. 23; Dymond, *Prin. of Morality*, Essay 1, pt. 2, ch. 4; Manning, *Law of Nations*, pp. 57-58; Cotellet, *Droit des Gens*, pt. 1; Heineccius, *Elementa Juris Nat. et Gent.*, lib. 1, cap. 1, sec. 12.)

[Woolsey: *Introduction International Law*, ed. 1892, sec. 15, page 14.]

SEC. 15. * * * But what are the rational and moral grounds of international law? As we have seen, they are the same in general with those on which the rights and obligations of individuals in the state and of the single state towards the individuals of which it consists, repose. If we define natural *jus* to be the science which from the nature and destination of man determines his external relations in society, both the question, What ought to be the rights and obligations of the individual in the state? and the question, What those of a state among states ought to be? fall within this branch of science. That there are such rights and obligations of states will hardly be doubted by those who admit that these relations of natural justice exist in any case. There is the same reason why they should be applied in regulating the intercourse of states as in regulating that of individuals.

There is a natural destination of states, and a divine purpose in their existence, which makes it necessary that they should have certain functions and powers of acting within a certain sphere, which external force may not invade. It would be strange if the state, that power which defines rights and makes them real, which creates *moral persons* or associations with rights and obligations, should have no such relations of its own—should be a physical and not a moral entity. In fact, to take the opposite ground would be to maintain that there is no right and wrong in the intercourse of states, and to leave their conduct to the sway of mere convenience.

[Wolff, quoted by Vattel, preface to seventh American ed., page ix.]

Nations do not, in their mutual relations to each other, acknowledge any other law than that which nature herself has established. Perhaps, therefore, it may appear superfluous to give a treatise on the law of nations as distinct from the law of nature. But those who entertain this idea have not sufficiently studied the subject. Nations, it is true, can only be considered as so many individual persons living together in the state of nature; and, for that reason, we must apply to them all the duties and rights which nature prescribes and attributes to men in general, as being naturally born free, and bound to each other by no ties but those of nature alone. The law which arises from this application, and the obligations resulting from it, proceed from that immutable law founded on the nature of man; and thus the law of nations certainly belongs to the law of nature; it is, therefore, on account of its origin, called the *natural*, and, by reason of its obligatory force, the *necessary*, law of nations. That law is common to all nations; and if any one of them does not respect it in her actions, she violates the common rights of all the others.

But nations or sovereign States being moral persons and the subjects of the obligations and rights resulting, in virtue of the law of nature, from the act of association which has formed the political body, the nature and essence of these moral persons necessarily differ, in many respects, from the nature and essence of the physical individuals, or

men, of whom they are composed. When, therefore, we would apply to nations the duties which the law of nature prescribes to individual man, and the rights it confers on him in order to enable him to fulfill his duties, since those rights and those duties can be no other than what are consistent with the nature of their subjects, they must, in their application, necessarily undergo a change suitable to the new subjects to which they are applied. Thus, we see that the law of nations does not, in every particular, remain the same as the law of nature, regulating the actions of individuals. Why may it not, therefore, be separately treated of as a law peculiar to nations?

[From "Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime," par L. B. Hautefeuille, 1848, vol. 1, pages 46, 12 *et seq.* Translation.]

He (God) has given to nations and to those who govern them a law which they are to observe towards each other, an unwritten law, it is true, but a law which He has taken care to engrave in indelible characters in the heart of every man, a law which causes every human being to distinguish what is true from what is false, what is just from what is unjust, and what is beautiful from what is not beautiful. It is the divine or natural law; it constitutes what I shall call primitive law.

This law is the only basis and the only source of international law. By going back to it, and by carefully studying it, we may succeed in retracing the rights of nations with accuracy. Every other way leads infallibly to error, to grave, nay, deplorable error, since its immediate result is to blind nations and their rulers, to lead them to misunderstand their duties, to violate them, and too often to shed torrents of human blood in order to uphold unjust pretensions. The divine law is not written, it has never been formulated in any human language, it has never been promulgated by any legislator; in fact, this has never been possible, because such legislator, being man and belonging to a nation, was from that very fact without any authority over other nations, and had no power to dictate laws to them.

This lack of a positive text has led some publicists to deny the existence of the natural law, and to reject its application. They have based their action in so doing more particularly upon the different way in which each individual interprets that law, according as his organization is more or less perfect, more or less powerful, if I may thus express myself; hence, it results that this law is different for each individual and for each nation, that is to say, that it does not exist. One of these writers, in support of his denial of the natural law, lays down the principle that man brings nothing with him into this world except feelings of pain or pleasure, and inclinations that seek to be satisfied, which can never be entitled to the name of laws, since they vary according to the organization of each individual, because they are by no means the same among all nations and in all climates.¹

These opinions would perhaps have some appearance of reason if the natural law were represented as a written system of legislation or as a complete code similar to those which govern human society and the members who compose it. Then it might be said with Moser: "What

¹ What is natural in man is his feelings of pain or pleasure, his inclinations; but to call these feelings and inclinations laws, is to introduce a false and dangerous view and to put language in contradiction with itself, for laws must be made for the very purpose of repressing these inclinations. * * * (Jeremy Bentham, *False Manner of Reasoning in Matters of Legislation.*)

is this law which is so much talked about? Must we seek its principles in Grotius or Hobbes?"¹

Some one might ask to see that code which is destined to prevent all wars by foreseeing and condemning all unjust claims in advance. It is not thus, however, that the natural law is presented by those authors who have taken its teachings as the basis of their writings; they have never sought to give it a body or to put it in the form of a written law. What is true, and, in my opinion, incontestable, is that notions of what is just and what is unjust are found in all men; it is that all individuals of the human race that are in the enjoyment of reason have these notions graven upon their hearts, and that they bring with them into the world when they are born. These notions do not extend to all the details of law as do civil laws, but they have reference to all the most prominent points of law, if I may thus express myself.

It can not be denied that the idea of property is a natural and innate idea. The same is the case with the idea which impels every individual to exercise care for his own preservation with that which forbids men to enrich themselves at the expense of others; which imposes the obligation to repair a wrong done to one's fellow-man, to perform a promise made, etc., etc. These first and innate notions, which every man brings with him into the world when he is born, are the precepts of the natural law; and human laws are all the more perfect the nearer they approach to these divine precepts. The natural or divine law is the only one that can be applied among nations—among beings free from every bond and having no interest in common.

From these general rules of divine law it is easy to form secondary laws having for their object the settlement of all questions that can arise among all the peoples of the universe. To cite but a single example, it is evident that from the principle of the law emanating from God, that every nation is free and independent of every other nation (which principle is recognized by all men), this consequence results, which is necessary and absolute, as is the principle itself, viz: That every nation may freely exchange its superfluous possessions, trade with whomsoever it may choose to seek in order to make such exchange and to carry on such trade, without being under any necessity of applying for the permission of a third nation. The only condition that it must fulfill is that it must obtain the consent of the other party to the contract. It need not trouble itself about the annoyance that such exchange may cause a third nation, provided such trade does not interfere with the positive and natural rights of such nation.

This second rule gives rise to several others which are as clear and absolute as it is itself. In a word, all international law is the outgrowth of natural and primitive law. Viewed in this light, it seems to me impossible to dispute the existence of the primitive law; it is a kind of mathematical truth, and I do not fear to reply to Moser; the principles of this law are not only in Grotius and Hobbes, but they are in the hearts of all men, they are in the heart of you who ask where they are found.

International law is, therefore, based upon the divine and primitive law; it is all derived from this source. By the aid of this single law, I firmly believe that it is not only possible, but even easy, to regulate all relations that exist or may exist among the nations of the universe. This common and positive law contains all the rules of justice; it exists

¹ (Moser, "Essai sur le droit des gens des plus modernes des nations européennes en paix et en guerre, 1778-1780.")

independently of all legislation of all human institutions, and it is one for all nations. It governs peace and war, and traces the rights and duties of every position. The rights which it gives are clear, positive, and absolute; they are of such a nature as to reciprocally limit each other without ever coming into collision or contradiction with each other; they are correlative to each other, and are coordinated and linked with the most perfect harmony. It can not be otherwise. He who has arranged all the parts of the universe in so admirable a manner, the Creator of the world, could not contradict himself.

* * * * *

The natural law is, from its very nature, always obligatory. The treaties which recall its provisions and regulate their application must necessarily have the same perpetuity, since, even if they should cease to exist, the principles would not cease to be executory just as they were when the stipulations were in force. * * *

Certain usages have become established among civilized nations without ever having been written in any treaty, and without ever having formed the subject of any special and express agreement. These usages, few in number, in harmony with primitive law, whose application they serve to regulate, form a part of international law which might be called the law of custom; it seems to me preferable to consider them as a part of secondary law.

[From "*Le Droit de la Nature et des Gens*," par le Baron de Pufendorf, traduit du Latin par Jean Barbeyrac. 5th ed., Vol. 1, Book 2, chap. 3, sec. 23, pages 243 *et seq.* Translation.]

Finally, we must further examine here, whether there is a positive law of nations, different from the natural law. Learned men are not well agreed on this subject. Many think that the natural law and the law of nations are, in point of fact, but one and the same thing, and that they differ in name only. Thus, Hobbes divides the natural law into natural law of man and natural law of states. The latter, in his opinion, is what is called the law of nations. "The maxims," adds he, "of both these laws are precisely the same; but as states, as soon as they are found, acquire, to a certain extent, personal characteristics, the same law that is called natural, when the duties of private individuals are mentioned, is called the law of nations when reference is made to the whole body of a state or nation."

I fully subscribe to this view, and I recognize no other kind of voluntary or positive international law, at least none having force of law, properly so called, and binding upon nations as emanating from a superior. There is, in fact, no variance between our opinion and that of certain learned men who regard that which is in harmony with a reasonable nature as belonging to natural law, and that which is based upon our needs, which can not be better provided for than by the laws of sociability, as belonging to the law of nations. For we maintain simply that there is no positive law of nations that is dependent upon the will of a superior. And that which is a consequence of the needs of human nature should, in my opinion, be referred to the natural law. If we have not thought proper to base this law upon the agreement of the things which are its object, with a reasonable nature, this was in order not to establish in reason itself the rule of the maxims of reason, and to avoid the circle to which is reduced the demonstration of the natural laws by this method.

Moreover, the majority of the things which the Roman juriconsults and the great body of learned men refer to the law of nations, such

as the different kinds of acquisition, contracts, and other similar things, either belong to the natural law or form part of the civil law of every nation. And, although in regard to those things which are not based upon the universal constitution of the human race, the laws are the same among the majority of the nations, no particular kind of law results from this, for it is not in virtue of any agreement or of any mutual obligation that these laws are common to several peoples, but purely and simply from an effect of the particular will of the legislators of each State, who have by chance agreed in ordering or forbidding the same things. Hence it is that a single people can change these laws of its own accord without consulting others, as has frequently been done.

We must not, however, absolutely reject the opinion of a modern writer, who claims that the Roman juriconsults understand by law of nations that law which concerns those acts which foreigners could perform, and the business which they could validly transact in the states belonging to the Roman people, in contrast with the civil law that was particular to Roman citizens. Hence it was that wills and marriages, which were valid among citizens only were referred to civil law, while contracts were considered as coming under the law of nations, because foreigners could make them with citizens in such a manner that they were valid before the Roman courts of justice. Many also apply the name law of nations to certain customs, especially in matters relating to war, which are usually practiced by a kind of tacit consent, among the majority of nations, at least among those that pride themselves on having some courtesy and humanity.

In fact, inasmuch as civilized nations have attached the highest glory to distinction in war; that is to say, to daring and knowing how skillfully to cause the death of a large number of persons, which has in all ages given rise to many unnecessary or even unjust wars, conquerors, in order not to render themselves wholly odious by their ambition, have thought proper, while claiming every right that one has in a just war—have thought proper, I say, to mitigate the horrors of war and of military expeditions by some appearance of humanity and magnanimity. Hence the usage of sparing certain kinds of things and certain classes of persons, of observing some moderation in acts of hostility, of treating prisoners in a certain way, and other similar things. Yet while such customs seem to involve some obligation, based at least upon a tacit agreement, if a prince in a just war fails to observe them, provided that by taking an opposite course he does not violate natural law, he can be accused of nothing more than a kind of discourtesy, in that he has not observed the received usage of those who regard war as being one of the liberal arts; just as among fencing masters, one who has not wounded his man according to the rules of art is regarded as an ignorant person.

Thus, so long as none but just wars are carried on, the maxims of natural law alone may be consulted, and all the customs of other nations may be set at naught unless one is interested in conforming thereto, so as to induce the enemy to perform less rigorous acts of hostility against us and against our party. Those, however, who undertake an unjust war, do well to follow these customs, so as to maintain at least some moderation in their injustice. As, however, these are not reasons that are generally to be considered, they can constitute no universal law, obligatory upon all nations; especially since in all things that are only based upon tacit consent anyone may decline to be bound by them by expressly declaring that he will not be so bound, and that he is willing that others should not be thereby bound in their dealings with him.

We observe that not a few of these customs have, in course of time been abolished, and that in some cases directly opposite customs have been introduced.

In vain has a certain writer impugned our opinion as if it were subversive of the foundations of the safety, advantage, and welfare of nations; for all that is not dependent upon the customs just referred to, but upon the observance of the natural law, which is a much more solid principle and one deserving of much greater respect. If its rules are carefully observed, mankind will not have much need of these customs. Moreover, by basing a custom upon the maxims of natural law, a much more noble origin is given it, and also much greater authority than if it were made to depend upon a mere agreement among nations.

[Ortolan. *International Rules and Diplomacy of the Sea*. Paris, 1864, vol. 1, book I, ch. iv., page 71. Translation.]

It is apparent that nations not having any common legislator over them have frequently no other recourse for determining their respective rights but to that reasonable sentiment of right and wrong, but to those moral truths already brought to light and to those which are still to be demonstrated. This is what is meant when it is said that natural law is the first basis of international law. This is why it is important that Governments, diplomats, and publicists that act, negotiate, or write upon such matters should have deeply (rooted) in themselves this sentiment of right and of wrong which we have just defined, as well as the knowledge of the point of certainty (point de certitude) where the human mind has been able to attain this order of truths.

But nations are not reduced only to that light, too often uncertain of human reason, for defining their reciprocal rights. Experience, imitation of accomplished precedents, and long practical usage habitually and generally observed add to it what is termed a *custom* which forms the rule of international conduct and from which flows on one or the other side positive rights (adroits). The binding force of custom is founded on consent, the tacit agreement, of nations. Nations have thus tacitly agreed among themselves, and they have bound themselves through this tacit agreement, for the reason that they have practiced it so long and so generally.

The supremacy of custom is much more frequently exercised and much more extensive in international law than in private law; precisely because in international law there is no common legislator to restrain such supremacy by formulating the rule of conduct in writing. Custom is often conformable to the light of reason upon that which is right or wrong because it emanates from communities or collections of reasonable beings; but frequently also it is contrary to it, because the reason of man, individual or collective, is subject to error; finally, it tends more and more intimately to approach it, because the path of man, an essentially perfectible being, is a path of improvement and progress.

* * * * *

It must be stated that treaties, far from justifying the exclusion of moral truths of what is right or wrong, among nations, which one wishes to deduce from them, precisely only obtain their binding force but from one or the other of those truths. It is because the natural sentiment of right dictates to all that a regular agreement of independent wills between qualified persons on allowable subjects and cases binds the contracting parties to each other, it is therefore that treaties

are recognized as obligatory. They only draw, therefore, their fundamental authority except from natural law, employing for an instant this term, the sense of which we have before explained. And it is also from natural law that is generally deduced the idea of the necessary conditions to establish the validity of treaties, and that of the legitimate consequences ensuing from their violation.

[From "A Methodical System of Universal Law," by J. G. Heineccius (Turnbull's Translation), vol. 1., ed. 1763.]

SEC. XII, page 8: The law of nature, or the natural rule of rectitude, is a system of law promulgated by the eternal God to the whole human race by reason. But if you would rather consider it as a science, natural morality will be rightly defined the practical habit of discovering the will of the supreme legislator by reason, and of applying it as a rule to every particular case that occurs. Now, because it consists in deducing and applying a rule coming from God, it may be justly called *divine jurisprudence*.

SEC. XXI, page 14: *Since the law of nature comprehends all the laws promulgated to mankind by right reason; and men may be considered either as particulars singly, or as they are united in certain political bodies or societies; we call that *law*, by which the actions of particulars ought to be governed, *the law of nature*, and we call that *the law of nations*, which determines what is just and unjust in society or between societies. And therefore the precepts, or the laws of both are the same; nay, the *law of nations* is the law of nature itself, respecting or applied to social life and the affairs of societies and independent states.

SEC. XXII, page 15: Hence we may infer, that the law of nature doth not differ from the law of nations, neither in respect of its foundation and first principles, nor of its rules, but solely with respect to its object. Wherefore their opinion is groundless, who speak of, I know not what, law of nations distinct from the law of nature. The positive or secondary law of nations devised by certain ancients, does not properly belong to that law of nations we are now to treat of, because it is neither established by God, nor promulgated by right reason; it is neither common to all mankind nor unchangeable.

[From Vattel on the Law of Nations, seventh American ed., 1849.]

There certainly exists a natural law of nations since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals. But, to acquire an exact knowledge of that law, it is not sufficient to know what the law of nature prescribes to the individuals of the human race. The application of a rule to various subjects, can no otherwise be made than in a manner agreeable to the nature of each subject. Hence, it follows, that the natural law of nations is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns. (Preface, page v.)

The moderns are generally agreed in restricting the appellation of "The Law of Nations" to that system of right and justice which ought to prevail between nations or sovereign states. (Preface, page vi.)

The necessary and the voluntary law of nations are therefore both established by nature, but each in a different manner; the former as a sacred law which nations and sovereigns are bound to respect and follow in all their actions; the latter, as a rule which the general welfare

and safety oblige them to admit in their transactions with each other. The necessary law immediately proceeds from nature; and that common mother of mankind recommends the observance of the voluntary law of nations, in consideration of the state in which nations stand with respect to each other, and for the advantage of their affairs. (Preface, page XIII.)

As men are subject to the law of nature—and as their union in civil society can not have exempted them from the obligation to observe those laws, since by that union they do not cease to be men, the entire nation, whose common will is but the result of the united wills of the citizens, remains subject to the *laws of nature*, and is bound to respect them in all her proceedings. (Page LVI., sec. 5.)

“We must, therefore, apply to nations the rules of the law of nature, in order to discover what their obligations are, and what their rights: consequently, the *law of nations* is originally no other than the *law of nature applied to nations*.” (Page LVI, sec. 6.)

[From G. F. von Martens, *Law of Nations*, page 2 of Introduction. (German.)
Translated by William Cobbet, 4th ed., 1829.]

The second sort of obligations are those which exist between nations. Each nation being considered as a moral being, living in a state of nature, the obligations of one nation towards another are no more than those of individuals, modified and applied to nations; and this is what is called the *natural law of nations*. It is *universal* and *necessary*, because all nations are governed by it, even against their will. This law, according to the distinction between perfect and imperfect, is perfect and external (the law of nations, strictly speaking), or else imperfect and internal, by which last is understood the morality of nations.

[SEC. 2 of the Positive Law of Nations.]

It is hardly possible that the simple law of nature should be sufficient even between individuals, and still less between nations, when they come to frequent and carry on commerce with each other. Their common interest obliges them to soften the rigor of the law of nature, to render it more determinate, and to depart from that perfect equality of rights, which must ever, according to the law of nature, be considered as extending itself even to the weakest. These changes take place in virtue of conventions (express or tacit) or of simple custom. The whole of the rights and obligations, thus established between two nations, form the positive law of nations between them. It is called *positive*, particular, or arbitrary, in opposition to the natural, universal, and necessary law.

[From Jan Helenus Ferguson, Dutch, but apparently written in English, “*Manual of International Law*” (1884), Vol. I, Part I, Ch. III, sec. 21, page 66.]

International law, being based on international morality, depends upon the state of progress made in civilization. Hence arises the difficulty of giving an all-comprehending definition to international law. What *ought* to be permanently understood among civilized nations as the main principles and the basis of their mutual intercourse, we have noted already to be the moral law of nature. But we have also seen that the spirit of law is the practical medium through which this general law influences humanity at all the stages of progress on the road to civilization.

Investigating thus this spirit of law, we find the definition of international law to consist in *certain rules of conduct which reason, prompted by conscience, deduces as consonant to justice, with such limitations and modifications as may be established by general consent, to meet the exigencies of the present state of society as existing among nations and which modern civilized states regard as binding them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country.*

[From "Le Droit Public International Maritime," par Carlos Testa (Portuguese), translated by H. Boutiron, 1886. part I, chap. 1, pages 46 *et seq.*]

Force may constitute, in physical matters, the superiority of one individual over another; but reason and conscience establish, in moral matters, other means which are controlled by the notion of duty and right. It is the whole body of these precepts, which are just, necessary, and immutable, for every reasoning being, and graven by God in the human conscience, that constitutes the natural or primitive law. The object of a law regulating the conduct of men is to impose moral obligations or to authorize certain acts from which advantages may result.

In the former case the law establishes the duty; in the latter it considers the right. The natural or primitive law, when it designates the duties that it imposes, at once establishes the correlative duties which are its outgrowth, and which constitute the principles of natural or primitive law.

The science of natural law is therefore based upon the principles of that intuitive law which, while giving the ability to practice that which is morally just, establishes the principles to be observed in the relations between one individual and another for the different hypotheses of social life.

Duty is a matter of precept, while right is optional; yet right and duty are essentially correlative; and in the reciprocal relations between one individual and another, that which constitutes a duty for one, establishes a right for another. The same is the case in the mutual relations of collective bodies.

It is an axiom which results from the study of the moral nature of man that alone and isolated he cannot attain his welfare, and that sociability is a condition which is by nature necessary to enable him to attain his highest advantage. This natural cause has produced the family, a social element which determines the formation of nations.

Now, natural law, which is essentially connected with human nature, and which prescribes certain principles that are to control the reciprocal relations between one individual and another, is likewise and for the same reason applicable to the relations existing among collective bodies of individuals, which constitute so many moral entities. It is, therefore, the common law of association—that is to say, of nationalities.

This application of the precepts of natural law, which obliges nations to practice the same duties that it prescribes for individuals, constitutes the law of nations, which, when considered according to its origin (which is based upon natural law), is also called the primitive or necessary law of nations.

Respect for the law of nations is consequently as obligatory among nations as is respect for natural law among individuals.

From the fact that the various civil societies which form nations or states, are independent, it results that the internal laws which constitute the public law of some can not be extended to the others—that is to

say, the internal public law of each nation or state can not be regarded as an external and absolute law, to which others must submit.

Hence it results that, in order to fix the limits at which the law of nations stops, it is absolutely necessary to have recourse to the various elements that can give it birth. These elements are:

1. The general principles of natural law, constituting the primitive law which is the outgrowth of the presumable consent of nations;
2. The law of custom, constituting the secondary law that emanates from tacit consent;
3. Conventional law, likewise constituting the secondary law which arises from expressed consent.

The origins of international law are therefore three in number:

1. The reason and the conscience of what is just and unjust, independent of any prescription;
2. Custom;
3. Public treaties.

The principles, practices, and usages of the law of nations, in accordance with these limits, regulate the conduct of nations, and it is for this reason that in their generality they constitute international law.

Conventional law may abrogate the law of custom, but it loses its character as a law if it establishes provisions at variance with natural law.

Although in the philosophical order natural law occupies the first place, yet in the practical order of external relations, when questions are to be decided or negotiations conducted, its rank is no longer the same; in these cases the obligations contracted in the name of conventional law, in virtue of existing treaties, are considered in the first place. If such treaties are lacking, the law of custom establishes the rule; and when there are neither treaties to invoke nor customs to follow, it is usual to proceed in accordance with what reason establishes as just, and with the simple principle of natural law.

When external public law derives its origin from the law of convention and custom, it constitutes what publicists designate as positive or secondary international law; when it is derived merely from the principles of natural law, it is called the primitive law of nations.

[From Burlamaqui "The Principles of Natural and Politic Law." Translated by Nugent, 1823, Part II, ch. vi, pages 135, 136.]

IV. All societies are formed by the concurrence or union of the wills of several persons with a view of acquiring some advantage. Hence it is that societies are considered as bodies, and receive the appellation of moral persons. * * *

V. This being supposed, the establishment of states introduces a kind of society amongst them, similar to that which is naturally between men; and the same reasons which induce men to maintain union among themselves, ought likewise to engage nations or their sovereigns to keep up a good understanding with one another.

It is necessary, therefore, there should be some law among nations to serve as a rule for mutual commerce. Now this law can be nothing else but the law of nature itself, which is then distinguished by the name of the law of nations. *Natural law*, says Hobbes, very justly (De Cive, cap. 14, sec. 4), *is divided into the natural law of man and the natural law of states; and the latter is what we call law of nations.* Thus natural law and the law of nations are in reality one and the same thing, and differ only by an external denomination. We must therefore say that the law of nations, properly so called, and considered as a law proceeding from a superior, is nothing else but the law of na-

ture itself, not applied to men, considered simply as such, but to nations, States, or their chiefs, in the relations they have together, and the several interests they have to manage between each other.

VI. There is no room to question the reality and certainty of such a law of nations obligatory of its own nature, and to which nations, or the sovereigns that rule them, ought to submit. For if God by means of right reason imposes certain duties between individuals, it is evident he is likewise willing that nations, which are only human societies, should observe the same duties between themselves. (See ch. v, sec. 8.)

SEC. IX. * * * There is certainly an universal, necessary, and self-obligatory law of nations, which differs in nothing from the law of nature, and is consequently immutable, insomuch that the people or sovereigns can not dispense with it, even by common consent, without transgressing their duty. There is, besides, another law of nations which we may call arbitrary and free, as founded only on an express or tacit convention, the effect of which is not of itself universal, being obligatory only in regard to those who have voluntarily submitted thereto, and only so long as they please, because they are always at liberty to change or repeal it. To this we must likewise add that the whole force of this sort of law of nations ultimately depends on the law of nature, which commands us to be true to our engagements. Whatever really belongs to the law of nations may be reduced to one or other of these two species; and the use of this distinction will easily appear by applying it to particular questions which relate either to war, for example, to ambassadors, or to public treaties, and to the deciding of disputes which sometimes arise concerning these matters between sovereigns.

SEC. X. It is a point of importance to attend to the origin and nature of the law of nations, such as we have now explained them. For, besides that it is always advantageous to form just ideas of things, this is still more necessary in matter of practice and morality. It is owing perhaps to our distinguishing the law of nations from natural law, that we have insensibly accustomed ourselves to form quite a different judgment between the actions of sovereigns and those of private people. Nothing is more usual than to see men condemned in common for things which we praise, or at least excuse in the persons of princes. And yet it is certain as we have already shown, that the maxims of the law of nations have an equal authority with those of the law of nature, and are equally respectable and sacred, because they have God alike for their author. In short, there is only one sole and the same rule of justice for all mankind. Princes who infringe the law of nations commit as great a crime as private people who violate the law of nature; and if there be any difference in the two cases, it must be charged to the prince's account, whose unjust actions are always attended with more dreadful consequences than those of private people.

Other citations might be added almost indefinitely. The following references may be added:

F. de Martens, *Int. Law*, Paris, 1883, Vol. 1, pages 19, 20; Li. R. P. Tuparelli d'Azeglio, *de la Compagnie de Jésus*, Traduit de l'Italien, deux ed. tome II, ch. 2; Grotius *De Jure*, Belli ac Pacis. Proleg; Heffter, *Int. Law of Europe*, page 2; Bluntschli, *Le Droit Int. Codifié*, pages 1, 2; Pasquale Fiore, book 1, ch. 1; Ahrens, *Course of Natural Law and The Philosophy of Law*, Vol. II, book III, ch. 1; M. G. Masse, *Commercial Law in its Relations to the Law of Nations*, etc., Paris, 1874, book 1, Lib. II, ch. 1, page 33; Louis Renault, *Introduction à l'Étude du Droit International*, Paris, 1879, pages 13, 14.

SECOND.

THE ACQUISITION BY RUSSIA OF JURISDICTIONAL OR OTHER RIGHTS OVER BERING SEA AND THE TRANSFER THEREOF TO THE UNITED STATES.

The first four questions submitted to the High Tribunal by the Treaty are these:

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?
2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?
3. Was the body of water now known as the Behring Sea included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said treaty?
4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Bering Sea east of the water boundary in the treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that treaty?

The learned Arbitrators may have themselves had occasion to observe, and, if not, it will at an early stage in the discussion of this controversy become manifest to them, that in the consideration by writers upon international law and by learned judges administering that law, of the authority which nations may exercise upon the high seas, two subjects, essentially distinct, have been habitually confounded, and have not, even at this day, been clearly separated and defined. One is the exercise of the sovereign right of making laws operative upon the high seas and binding as well upon foreigners as citizens, which right must necessarily be limited by some definite boundary line. The other is the protection afforded by a nation to its property and other rights by reasonable and necessary acts of power against the citizens of other nations whenever it may be necessary on the high seas without regard to any boundary line. Much of this confusion has arisen and been fostered by the lack of precision in the meaning of words. The term "jurisdiction" has from the first been indifferently employed to denote both things. It has thus become a word of ambiguous import.

These two subjects may appear to have been to some extent confounded, or blended, in the minds of the negotiators of the treaty, for the four questions now about to be considered appear, at first view, to embrace both. The Tribunal is called upon to determine, on the one hand, what *exclusive jurisdiction in Bering Sea* Russia has asserted and exercised, which may not unreasonably be viewed as referring to the exercise of the sovereign power of legislation over that sea, tantamount to an extension of territorial sovereignty.

It is also called upon to determine what exclusive right in the "seal fisheries" in Bering Sea Russia asserted and exercised prior to the cession to the United States—a totally different question—although a decision of it, affirming the exclusive right, might carry with it, as a consequence, the right to protect such fisheries by a reasonable exercise of national power anywhere upon the seas where such exercise might be necessary.

And yet it is not probable that the negotiators, even if the two questions were to them distinctly in view, really intended to assign a distinct and separate importance to the *first*. The *real controversy* was upon the *second*, and the *first* was intended to be included, only so far as it might have a bearing upon the second. This is quite manifest from the circumstance that in neither of the four questions is the first of the two rights or claims stated alone and apart from the other; and still more from the language of the second question, which clearly implies that the claim of a right to exercise authority on the sea in defense of a property interest is the one principally intended to be submitted. The language is as follows: "How far were *these* claims of jurisdiction *as to the seal fisheries* recognized and conceded by Great Britain." This language clearly shows that the Russian claims of exclusive jurisdiction designed to be submitted to the Tribunal were such only as asserted a right to protect the sealing interest of Russia by action upon Bering Sea. And there is nothing in the diplomatic correspondence which led up to the treaty disclosing any assertion on the part of the United States to the effect that Russia had ever gained any right of exclusive legislation over that sea. On the contrary, such assertion had been emphatically disclaimed.

It is by no means intended in what has been said that the question what authority on Bering Sea, or, to use the ambiguous word, what "jurisdiction" in Bering Sea, Russia had asserted and exercised in relation to her sealing interests, is unimportant. That question, although

in no sense a vital one, has a material bearing, and was designed to be embraced by the arbitration. The question whether property rights and interests exist, is one thing; the question what the nation to which they belong may, short of an exercise of the sovereign power of exclusive legislation, do by way of protecting them, is another; and both are by the treaty submitted to the Tribunal. Should it appear that Russia had for nearly a century actually asserted and exercised an authority in Bering Sea for the purpose of protecting her sealing interests, and that Great Britain had never resisted or disputed it, it would be quite too late for her now to draw the reasonableness of it into question.

A studied effort is made in the Case of Great Britain to make it appear that the United States have shifted their ground from time to time in relation to the subject of this controversy, by first asserting that Bering Sea was *mare clausum*; then by setting up an exclusive jurisdiction over an area with a radius of 100 miles around the Pribilof Islands; and, lastly, by abandoning both those positions, and asserting a property interest in the herds of seals. This appears from the deliberate statement which closes the Seventh Chapter of the Case of Great Britain, as follows:

The facts stated in this chapter show:

That the original ground upon which the vessels seized in 1886 and 1887 were condemned, was that Bering Sea was a *mare clausum*, an inland sea, and as such had been conveyed, in part, by Russia to the United States.

That this ground was subsequently entirely abandoned, but a claim was then made to exclusive jurisdiction over 100 miles from the coast-line of the United States' territory.

That subsequently a further claim has been set up to the effect that the United States have a property in and a right of protection over fur-seals in nonterritorial waters.

It will be necessary, in order to expose the error of this statement, to briefly review the several stages of the controversy, and draw attention to the grounds upon which the Government of the United States has taken its positions.

It was in September, 1886, that the attention of that Government was first called by Sir L. S. Sackville-West, Her Majesty's minister at Washington, to a reported seizure in Bering Sea of three British sealing vessels by a United States cruiser. Information only respecting the affair was at first asked for, and considerable delay occurred in procuring it; but, prior to September, 1887, copies of the records from the United States District Court of Alaska of the seizure and condemnation of these vessels had been furnished to the British Government. It appeared

from these that the seizures were made in Bering Sea at a greater distance than three miles from the land; and thereupon Lord Salisbury, apparently assuming that the statutes of the United States which authorized the seizures, were based upon some supposed jurisdiction over Bering Sea acquired from Russia, addressed a note to Sir L. S. Sackville-West, in which he called attention to the Russian ukase of 1821, which asserted a peculiar right in that sea, the objections of the United States and Great Britain to that assertion, and the treaties between those two nations, respectively, and Russia of 1824 and 1825, and insisted that these documents furnished evidence conclusively showing that the seizures were unlawful.¹

The United States Government did not then reply to the point thus raised; but its first attitude in relation to the matter was to suggest, by notes addressed to the different maritime nations, that a *peculiar property interest* was involved, which might justify the United States Government in exercising *an exceptional marine jurisdiction*; but that inasmuch as the race of fur-seals was of great importance to commerce and to mankind, it seemed the part of wisdom for the nations to consider whether some concurrent measures might not be agreed to which would, at the same time, preserve the seals and dispose of the cause of possible controversy.² The first attitude, therefore, taken by the United States was the suggestion of a *property interest*, and of an exceptional maritime right to protect it by preventing the destruction of the seals; but that all nations ought to unite in measures which would preserve them, and thus avoid occasion for controversy concerning the right.

On the 22d of January, 1890, Mr. Blaine, who had succeeded Mr. Bayard as Secretary of State, had occasion to make answer, in a note to Sir Julian Pauncefote, to further complaints on the part of the British Government concerning the course of the United States cruisers in intercepting Canadian vessels while engaged in taking fur-seals in the waters of Bering Sea. In the outset of his communication Mr. Blaine begins by pointing out that it is unnecessary to discuss any question of exclusive jurisdiction in the United States over the waters of that sea, because there were other grounds upon which the course of the United States was, in his opinion, fully justified. He thus expresses himself:

In the opinion of the President, the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that was in itself

¹ Case of the United States. Appendix, Vol. 1, p. 162.

² Case of the United States. Appendix, Vol. 1, p. 168.

contra bonos mores, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

Mr. Blaine then proceeds to point out that long before the acquisition of Alaska by the United States the fur-seal industry had been established by Russia upon the Pribilof Islands, and that while she had control over them, her possession and enjoyment thereof were in no way disturbed by other nations; that the United States, since the cession of 1867, had continued to carry on the industry, cherishing the herd of fur-seals on those islands and enjoying the advantage thereof; that in the year 1886, vessels, mostly Canadian, were fitted out for the purpose of taking seals in the open sea, and that the number of vessels engaged in the work had continually increased; that they engaged in an indiscriminate slaughter of the seals, very injurious to the industry prosecuted by the United States, and threatening the extermination, substantially, of the species. He insisted that the ground upon which Her Majesty's Government was disposed to defend these Canadian vessels, viz., that their acts of destruction were committed at a distance of more than three miles from the shore line, was wholly insufficient; that to exterminate an animal useful to mankind was in itself in a high degree immoral, besides being injurious to the interests of the United States; that the "law of the sea is not lawlessness," and that the liberty which it confers could not be "perverted to justify acts which are immoral in themselves, and which inevitably tend to results against the interests and against the welfare of mankind."

It is, therefore, entirely clear that Mr. Blaine improved the first occasion upon which he was called upon to refer to the subject, to place the claims of the United States distinctly on the ground of a *property interest*, which could not be interfered with by other nations upon the high seas by practices which in themselves were essentially immoral and contrary to the law of nature.¹

¹ Mr. Blaine to Sir Julian Pauncefote, *Case of the United States*, Appendix, Vol. 1, p. 200.

This correspondence was followed by further diplomatic communications looking to the establishment of regulations designed to restrict pelagic sealing; and on the 22d of May, 1890, the Marquis of Salisbury addressed a note to Sir Julian Pauncefote, in the nature of an answer to the note last above mentioned from Mr. Blaine, and it appears from this, very clearly, that he did not misunderstand the positions taken by Mr. Blaine. He thus expresses himself:

Mr. Blaine's note defends the acts complained of by Her Majesty's Government on the following ground:

1. That "the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States".

2. That the fisheries had been in the undisturbed possession and under the exclusive control of Russia from their discovery until the cession of Alaska to the United States in 1867, and that from this date onwards until 1886 they had also remained in the undisturbed possession of the United States Government.

3. That it is a fact now held beyond denial or doubt that the taking of seals in the open sea rapidly leads to the extinction of the species, and that therefore nations not possessing the territory upon which seals can increase their numbers by natural growth should refrain from the slaughter of them in the open sea.

Lord Salisbury, in this note, insists that whatever may be the value of the industry to the United States, they would not be authorized in preventing by force the practice of pelagic sealing; but he does not choose to enter into any discussion of the question whether the indiscriminate slaughter of seals manifestly tending to the extermination of the species could be justified. His lordship, however, in answer to the alleged exclusive monopoly of Russia in the fur-seal industry, referred to the Russian ukase of 1821, as if Mr. Blaine had insisted upon claims similar to those advanced in that document, and quoted some language from a communication of Mr. John Quincy Adams, when Secretary of State, to the United States minister in Russia, contesting the pretension set up in the ukase.¹

Meanwhile further diplomatic communications were taking place in relation to the establishment of restrictions designed to limit the practice of pelagic sealing and prevent, in some measure at least, its destructive operation; and it would seem that these efforts had been nearly successful, and would have been entirely consummated, but for objections interposed on the part of Canada.²

¹ Case of the United States, Appendix, Vol. I, p. 207.

² Case of the United States, Appendix, Vol. I, pp. 212-224.

On the 30th of June, 1890, Mr. Blaine addressed a note to Sir Julian Pauncefote in which he referred to Lord Salisbury's note, above mentioned, of May 22, and especially to the passage quoted in it from the communication of Mr. John Quincy Adams to the American minister in Russia, in which the pretensions advanced by Russia in the ukase of 1821 were resisted. He endeavored, in an argument of some length, to show that the claim set up by Russia in 1821 to a peculiar jurisdiction had not been surrendered by the treaties of 1824 and 1825 with the United States and Great Britain, respectively, so far as related to Bering Sea, and had not been otherwise abandoned. He insisted that the ukase of 1821, while not designed to declare the Bering Sea to be *mare clausum*, assumed to exclude, for certain purposes at least, other nations from a space on the high seas to the distance of 100 miles from the shore, and that this pretension on the part of Russia had never been surrendered or abandoned, and had been, in substance, acquiesced in by other nations, and in particular by Great Britain.¹

The views thus expressed by Mr. Blaine, which were really not essential to the main controversy, and were drawn from him by the reference which Lord Salisbury had made to the Russian ukase of 1821, and the subsequent protests, negotiations, and treaties between Russia and the United States and Great Britain, respectively, were responded to in a note from Lord Salisbury to Sir Julian Pauncefote of August 2, 1890.² In this note his lordship considered the subject at much length, and argued that, on general principles of international law, no nation can rightfully claim jurisdiction at sea beyond a marine league from the coast. This general principle, so far as it is one, had never been denied by Mr. Blaine, his position being that there might be, and in some instances were, cases which called for exceptions from the operation of the general rule, so far, at least, as to give a nation a right to exclude, for certain purposes, foreign vessels from a belt of the sea much wider than three miles.

On the 17th of December, 1890, Mr. Blaine, in a note to Sir Julian Pauncefote,³ referred to the note of Lord Salisbury, last mentioned, and reasserted his position. The controversy respecting the claims of Russia now became, substantially, whether, in the treaties of 1824 and 1825 between the United States and Great Britain, respectively,

¹Case of the United States, Appendix, Vol. I, p. 224.

²Case of the United States, Appendix, Vol. I, p. 242.

³Case of the United States, Appendix, Vol. I, p. 263.

the term "Pacific Ocean," as used in the treaties, was intended to include the body of water now known as Bering Sea. If it were true, as Lord Salisbury contended, that Bering Sea was thus included, then it would follow that the pretensions made by Russia in the ukase of 1821, so far as they were surrendered by the treaties above referred to, were surrendered as well in respect to Bering Sea as in respect to the Pacific Ocean south of that sea. If, on the other hand, as Mr. Blaine contended, Bering Sea was not intended to be embraced by the term "Pacific Ocean," it would follow that the assertions of jurisdiction in Bering Sea made by the ukase of 1821 had received a very large measure of acquiescence both from Great Britain and the United States.

But, in the opinion of the undersigned, the point, though not wholly irrelevant, is, comparatively speaking, unimportant. It was never put forward by the United States as the sole ground, or as the principal ground, upon which that Government rested its claims. Notwithstanding the large space devoted to it in the diplomatic discussions, it came in incidentally only. It is not at all improbable that Lord Salisbury preferred to draw the discussion as much as possible away from the question of property interests, and away from the charge that pelagic sealing was a practice which threatened a useful race of animals with extermination, and was wholly destitute of support upon any grounds of reason. It may be true also that Mr. Blaine in some measure magnified the effect which might flow from the pretensions made by Russia in the ukase of 1821, so far as they were acquiesced in by Great Britain and the United States.

But what is absolutely certain is that the original attitude taken by the United States, as already mentioned, followed up and reasserted in more than one diplomatic communication, was never, at any time, in the slightest degree abandoned or changed, and this is conclusively evidenced by the last communication of Mr. Blaine, already referred to. Near the close of that note¹ he says:

In the judgment of the President, nothing of importance would be settled by proving that Great Britain conceded no jurisdiction to Russia over the seal fisheries of the Bering Sea. It might as well be proved that Russia conceded no jurisdiction to England over the river Thames. By doing nothing in each case, everything is conceded. In neither case is anything asked of the other. "Concession," as used here, means simply *acquiescence* in the rightfulness of the title, and that is the only form of concession which Russia asked of Great Britain or which Great Britain gave to Russia.

¹Case of the United States, Appendix, Vol. 1, p. 235.

The second offer of Lord Salisbury to arbitrate, amounts simply to a submission of the question whether any country has a right to extend its jurisdiction more than one marine league from the shore. No one disputes that, as a rule; but the question is, whether there may not be exceptions whose enforcement does not interfere with those highways of commerce which the necessities and usage of the world have marked out. * * *

The repeated assertions that the Government of the United States demands that the Bering Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Bering Sea for the protection of the fur-seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*. Nor is it by any means so serious an obstruction as Great Britain assumed to make in the South Atlantic, nor so groundless an interference with the common law of the sea as is maintained by British authority to-day in the Indian Ocean. The President does not, however, desire the long postponement which an examination of legal authorities from Ulpian to Phillimore and Kent would involve. He finds his own views well expressed by Mr. Phelps, our late minister to England, when, after failing to secure a just arrangement with Great Britain touching the seal fisheries, he wrote the following in his closing communication to his own Government, September 12, 1888:

"Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

"Here is a valuable fishery and a large and, if properly managed, permanent industry, the property of the nation on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free.

"The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that can not be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*; and the right of self-defense as to person and property prevails there as fully as elsewhere. If the fish upon Canadian coasts could be destroyed by scattering poison in the open sea adjacent, with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this.

"If precedents are wanting for a defense so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules."

The design of the foregoing review of the principal points made in the diplomatic discussions which preceded the Treaty under which this Tribunal was constituted has been to show that the main grounds upon which, from first to last, the claims of the United States were based were the property and industrial interests of that nation; and that the purpose of Mr. Blaine, in taking up the discussion tendered by Lord Salisbury in relation to the ukase of 1821 and the subsequent treaties of 1824 and 1825, was simply to point out that the assertions by Russia of exceptional authority over certain portions of the high seas were, so far as respects Bering Sea, not only never abandoned by her, but were practically conceded and acquiesced in by Great Britain, and that, consequently, the United States could assert against Great Britain a right to protect their sealing interests, not only upon general principles of international law, but upon the additional and reinforcing ground that Russia, in order to defend the same interests, had asserted and exercised an exceptional authority over Bering Sea for nearly half a century with the acquiescence of Great Britain, and that any right thus acquired had passed to the United States by the cession of Alaska.

In the view of the undersigned, Mr. Blaine was entirely successful in establishing his contention that the assertion by Russia of an exceptional authority over the seas, including an interdiction of the approach of any foreign vessel within 100 miles of certain designated shores, while abandoned by her treaty with Great Britain in 1825 as to all the northwest coast south of the 60th parallel of north latitude, was, so far as respects Bering Sea, and the islands thereof, and the coast south of the 60th parallel, never abandoned by her, but was acquiesced in by Great Britain. And if the undersigned believed the point to be one upon which any of the claims of the United States really depended, they would deem it their duty to again present the argument of Mr. Blaine, together with further suggestions which would reinforce it. But they greatly prefer to place the case of the United States upon its real and original grounds, which, as it seems to them, admit of no dispute, and not to rely upon arguments which, however successful in their avowed purposes, are yet, perhaps, to be deemed somewhat aside from the main question. They prefer to submit to this Tribunal that Russia had for nearly a century before the cession of Alaska established and maintained a valuable industry upon the Pribilof Islands, founded upon a clear and indisputable property interest in the fur-seals which

make those islands their breeding places, an industry not only profitable to herself, but in a high degree useful to mankind; that the United States since the cession have, upon the basis of the same property interest, carefully maintained and cherished that industry, and that no other nations, or other men, have any right to destroy or injure it by prosecuting an inhuman and destructive warfare upon the seal in clear violation of natural law; and that the United States have full and perfect right, under the law of nations, to prevent this destructive warfare by the reasonable exercise of necessary force wherever upon the seas such exercise is necessary to the protection of their property and industry. The undersigned therefore submit the question concerning the assertions of maritime authority by Russia and the acquiescence therein by Great Britain upon the argument of Mr. Blaine, contained in his notes to Sir Julian Pauncefote of June 30, 1890,¹ and December 17, 1890.²

It is, however, important that the real nature of these assertions should not be misunderstood. The words "exclusive jurisdiction in Bering Sea" are used in the questions formulated in the treaty by way of description of the claims of Russia, and the same, or similar, language will be found in various places in the diplomatic argument to have been employed in a like sense. From this it might be thought that what Russia was supposed to have asserted, and what the United States claimed as a right derived from her, was a sovereign jurisdiction over some part of Bering Sea, making it a part of their territory and subject to their laws. This would be entirely erroneous. Russia never put forward any such pretension. Her claims were that certain shores and islands on the Northwest coast and in the Pacific Ocean and Bering Sea were part of her territory, acquired by discovery and occupation, upon which she had colonial establishments and fishing and sealing industries. She chose, in accordance with the policy of the time, to confine the right to trade with these colonies, and the fishing and furl-gathering industries connected with those territorial possessions, to herself. Concerning her right to do this there never was, or could be, any dispute. So far as her pretensions to exercise an exceptional maritime authority were concerned, they were limited to such measures as she deemed necessary for the protection of these admitted rights. She did not claim to make laws for the sea. The particular assertion of authority which was the interesting point in the discussion be-

¹Case of the United States, Appendix, Vol. 1, p. 224.

²*Ibid*, p. 263.

tween Mr. Blaine and Lord Salisbury was the interdiction to foreign vessels of an approach to the shores and islands referred to nearer than 100 miles. This, of course, was no assertion of exclusive jurisdiction, or of jurisdiction at all, in the strict sense of that term. It was the assertion of a right to protect interests attached to the shore from threats and danger of invasion. It was in no wise different *in its nature* from a multitude of assertions of a right to exercise national authority over certain parts of the sea made by different nations before and since, and by none more frequently or extensively than by Great Britain. It was an assertion of power essentially the same as that of which the *hovering laws* are instances. The extent of the interdiction from the shore—100 miles—might have been extreme, although this is by no means certain. A distance which would be excessive in the case of a frequented coast, the pathway of abundant commerce, might be entirely reasonable in a remote and almost uninhabited quarter of the globe to which there was little occasion for vessels to resort except for the purpose of engaging in prohibited trade. It must be remembered that the interdiction was not made for the purpose of preventing, or restricting, pelagic sealing. That pursuit had not even been thought of at that time. Had that danger then threatened the sealing interests of Russia a much more extensive restriction might justly have been imposed.

As already observed it is not intended by the undersigned to intimate that the question what authority over Bering Sea Russia claimed the right to exercise and how far the claim was acquiesced in by Great Britain, has no importance in the present controversy; but to point out the nature of that claim, and to indicate its appropriate place in the present discussion. It has a very distinct significance as showing that assertions on the part of Russia of a right to defend and protect her colonial trade and local industries by the reasonable exercise of force in Bering Sea were assented to by Great Britain during the whole period of the Russian occupation of Alaska, and, by consequence, that the present complaints of the latter against a similar exercise of power by the United States are wholly inconsistent with her former attitude and admissions.

Again referring to the broad distinction between that power of sovereign jurisdiction exercised by a nation over nonterritorial waters, which consists in the enactment of municipal laws designed to be operative upon such waters against the citizens of other nations, and the exercise of authority and power over such waters limited to the neces-

sary defense of its property and local interests, the undersigned insist that the former has no material place in this discussion. Russia never insisted upon it so far as respects the regions to which our attention is directed, or the industry of sealing which is here a subject of discussion. The United States never have claimed it and do not now claim it. Themselves a maritime nation, they assert, as they always have asserted, the freedom of the seas. But they suppose it to be quite certain that the doctrine of the freedom of the seas has never been deemed by civilized nations as a license for illegal or immoral conduct, or as in any manner inconsistent with the general and necessary right of self-defense above mentioned, which permits a nation to protect its property and local interests against invasion by wrongdoers wherever upon the sea the malefactors may be found. This right and the grounds and reasons upon which the present case calls for an application of it, are directly embraced by the Fifth Question which is submitted to the Tribunal, and are, in the opinion of the undersigned, the proper subjects of principal attention, and they will elsewhere, in the appropriate place, devote to them that deliberate and full consideration which importance their demands.

We may, however, briefly observe here, that according to the best authorities in international law the *occupation* of a new country which is sufficient to give to the occupying nation a title to it depends very largely upon the nature of the country and the beneficial uses which it may be made to subserve. In the case of a fruitful region capable of supporting a numerous population, it might not be allowable for a nation first discovering it to maintain a claim over vast areas which it did not actually occupy and attempt to improve; but where a remote and desolate region has been discovered, yielding only a single or few products, and all capable of being beneficially secured by the discovering nation, a claim to these products asserted and actually exercised, is all the occupation of which the region is susceptible and is sufficient to confer the right of property; and that whatever authority it may be reasonably necessary to exercise upon the adjoining seas in order to protect such interests from invasion may properly be asserted. Says Phillimore, who seems to have understood the Oregon territory as embracing the whole northwest coast of North America:

A similar settlement was founded by the British and Russian Fur Companies in North America.

The chief portion of the Oregon Territory is valuable solely for the fur-bearing animals which it produces. Various establishments in

different parts of this territory organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise of *proprietary right* of which these particular regions were at that time susceptible, and to mark that a *beneficial use* was made of the whole territory by the occupants.¹

The first four questions submitted to the Tribunal by the Treaty should, in the opinion of the undersigned, be answered as follows:

First. Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Bering Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1821, assert and enforce an exclusive right in the "seal fisheries" in said sea, and also asserted and enforced the right to protect her industries in said "fisheries" and her exclusive interests in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles.

Second. The claims of Russia above mentioned as to the "seal fisheries" in Bering Sea were at all times, from the first assertion thereof by Russia down to the time of the cession to the United States, recognized and acquiesced in by Great Britain.

Third. "The body of water now known as Behring Sea was not included in the phrase 'Pacific Ocean,' as used in the treaty of 1825, between Great Britain and Russia;" and after that treaty Russia continued to hold and to exercise exclusively a property right in the fur-seals resorting to the Pribilof Islands, and to the fur-sealing and other industries established by her on the shores and islands above mentioned, and to all trade with her colonial establishments on said shores and islands, with the further right of protecting, by the exercise of necessary and reasonable force over Bering Sea, the said seals, industries, and colonial trade from any invasion by citizens of other nations tending to the destruction or injury thereof.

Fourth. "All the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary in the treaty between the United States and Russia, of the 30th of March, 1867," did "pass unimpaired to the United States under that treaty."

JAMES C. CARTER.

¹ Int. Law, vol. 1, pp. 259, 260.

THIRD.

THE PROPERTY OF THE UNITED STATES IN THE ALASKAN SEAL HERD AND THEIR RIGHT TO PROTECT THEIR SEALING INTERESTS AND INDUSTRY.

I.—THE PROPERTY OF THE UNITED STATES IN THE ALASKAN SEAL HERD.

The subject which, in the order adopted by the treaty, is next to be considered, is that of the assertion by the United States of a property interest in the Alaskan seals. Under this head there are two questions, which, though each may involve, in large measure, the same considerations, are yet in certain respects so different as to make it necessary or expedient that they should be separately discussed. The *first* is whether the United States have a property interest in the seals themselves, not only while they are upon the breeding islands, but also while they are in the high seas. The *second* is whether, if they have not a clear property in the seals themselves, they have such a property interest in the *industry* long established and prosecuted on the Pribilof Islands of maintaining and propagating the herd, and appropriating the increase to themselves for the purposes of commerce and profit, as entitles them to extend their protection to such herd against capture while it is on the high seas, and to require and receive from other nations an acquiescence in reasonable regulations designed to afford such protection.

The material difference between these questions will be perceived from a glance at the consequences which would flow from a determination of each of them respectively in favor of the claims of the United States. If it were determined that the United States had the property interest which they assert only *in the industry* established on the shore, it might, with some show of reason, be insisted that, if the industry were not actually established, they would have no right to forbid interference with the seals in the open sea; but were it determined that the United States had the property interest which they assert in the seals themselves, it would follow that they would have the right at any time to take measures to establish such an industry, and to forbid any inter-

ference with the seals which would tend to make its establishment impossible or difficult.

The proposition which the undersigned will first lay down and endeavor to maintain is that the United States have, by reason of the nature and habits of the seals and their ownership of the breeding grounds to which the herds resort, and irrespective of the established industry above mentioned, a property interest in those herds as well while they are in the high seas as upon the land.

It is first to be observed that although the established doctrines of municipal law may be properly invoked as affording light and information upon the subject, the question is not to be determined by those doctrines. Questions respecting property in lands, or movable things which have a fixed *situs* within the territorial limits of a nation are, indeed, to be determined exclusively by the municipal law of that nation; but the municipal law can not determine whether movable things like animals are, while they are in the high seas, the property of one nation as against all others. If, indeed, it is determined that such animals have a *situs* upon the land, notwithstanding their visits to, and migration in the sea, it may then be left to the power which has dominion over such land to determine whether such animals are property; but the question whether they have this *situs* must be resolved by international law.

The position taken on the part of Great Britain is, not that the seals belong to her, but that they do not belong to any nation or to any men; that they are *res communes*, or *res nullius*; in other words, that they are *not the subject* of property, and are consequently open to pursuit and capture on the high seas by the citizens of any nation. This position is based upon the assertion that they belong to the class of wild animals, animals *feræ naturæ*, and that these are not the subject of ownership. On the other hand, it is insisted on the part of the United States that the terms *wild* and *tame*, *feræ* and *domitæ*, *naturæ*, are not sufficiently precise for a legal classification of animals in respect to the question of property; that it is open to doubt, in many cases, whether an animal should be properly designated as wild or tame, and that the assignment of an animal to the one class rather than to the other is by no means decisive of the question whether it is to be regarded as property. In the view of the United States, while the words *wild* and *tame* describe sufficiently for the purposes of common speech the nature and habits of animals, and indicate *generally* whether they are or

are not the subjects of property, yet there are many animals which lie near to the boundary imperfectly drawn by these terms, and in respect to which the question of property can be determined only by a closer inquiry into their nature and habits, and one more particularly guided by the considerations upon which the institution of property stands. If the question were asked why a tame or domestic animal should be property and a wild one not, these terms would be found to supply no reasons. The answer would be because tame animals exhibit certain qualities, and wild ones other and different qualities; thus showing that the question of property depends upon the characteristics of the animal. This view seems to be correct upon its mere statement, and it will be found to be the one adopted and acted upon by the writers of recognized authority upon the subject of property. It would be sufficient for the present purpose to refer to the language of Chancellor Kent upon this point. No dissent from it will anywhere be found. He says:

Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner. The difficulty of ascertaining with precision the application of the law arises from the *want of some certain determinate standard or rule* by which to determine when an animal is *feræ, vel domitæ naturæ*. If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then a subject clearly of absolute property; but if he belongs to the class of animals, which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long only as the tameness and dominion remain. It is a theory of some naturalists that all animals were originally wild, and that such as are domestic owe all their docility and all their degeneracy to the hand of man. This seems to have been the opinion of Count Buffon, and he says that the dog, the sheep, and the camel have degenerated from the strength, spirit, and beauty of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power. Grotius, on the other hand, says that savage animals owe all their untamed ferocity not to their own natures, but to the violence of man; but the common law has wisely avoided all perplexing questions and refinements of this kind, and has adopted the test laid down by Puffendorf,¹ by referring the question whether the animal be wild or tame to *our knowledge of his habits* derived from fact and experience.²

To this citation we may add the authority, which will not be disputed in this controversy, of two decisions of the court of common pleas in

¹ Law of Nature and Nations, Lib. 4, Chap. 6, sec. 5.

² Kent's Com., vol. 2, p. 348.

Great Britain. In the case of *Davies vs. Powell* (Willes, 46) the question was whether deer kept in an inclosure were *distrainable for rent*. The court took notice of the *nature and habits* of these animals as affected by the *care and industry of man* and the *uses which they were made to subserve*; and it observed that, while they were formerly kept principally for pleasure and not for profit, the practice had arisen of caring for them and rearing and selling them, and, in view of these facts, declared that they had become "as much a sort of husbandry as horses, cows, sheep, or any other cattle."

And, more recently, the question was made in the case of *Morgan v. The Earl of Abergavenny* (8 C. B., 768), whether deer thus kept passed upon the death of the owner to the heir or to the executor; that is to say, whether they were *personal* property or *chattels real*. Evidence was received upon the trial showing the *nature and habits* of the animals; that they were *cared for and fed* and *selections made from them for slaughter*; and upon this evidence it was left to the jury to say whether they were *personal* property. The jury found that they were; and the court upon a review of the case approved the verdict, holding that the question was justly made to depend upon the facts which had been given in evidence.

Inasmuch as the present controversy upon this point is one between nations, it can not be determined by a reference to the municipal law of either, or by the municipal law of any nation. The rule of decision must be found in international law; and, as has already been shown, if there is no actual practice or usage of nations directly in point, as there is not, recourse must be had to the principles upon which international law is founded—that is to say, to the law of nature. But the question whether a particular thing is the subject of property, as between nations, is substantially the same as the question whether the same thing is property as between individuals in a particular nation. Now, it so happens that this latter question has been determined, whenever it has arisen, not by any exercise of legislative power, but by an adoption of the rule of the law of nature. And the municipal jurisprudence of all nations, proceeding upon the law of nature, is everywhere in substantial accord upon the question what things are the subject of property. That jurisprudence, therefore, so far as it is consentaneous, may be invoked in this controversy, as directly evidencing the law of nature, and, therefore, of nations.

Proceeding to the examination of the doctrines of this municipal

jurisprudence, it appears, immediately, that there is no rule or principle to the effect that *no* wild animals are the subject of property. On the contrary we find that from an early period in the Roman law a distinct consideration has been given to the question, what animals, commonly designated as wild, are the subjects of property, and to what extent. And the doctrine established by that law, and adopted, it is believed, wherever that law has been received as the basis of municipal jurisprudence was also carried into the jurisprudence of England at the first stage of its development, and has ever since been received and acted upon by all English-speaking nations. It is well expressed in the Commentaries of Blackstone:¹

II. Other animals that are not of a tame and domestic nature are either not the objects of property at all or else fall under our other division, namely, that of *qualified, limited, or special* property, which is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist. In discussing which subject, I shall, in the first place, show how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature, and then how it may subsist in any other things when under particular circumstances.

First, then, a man may be invested with a qualified, but not an absolute property in all creatures that are *feræ naturæ*, either *per industriam, propter impotentiam, or propter privilegium*.

1. A qualified property may subsist in animals *feræ naturæ, per industriam hominis*, by a man's *reclaiming* and making them tame by art, industry, and education, or by so confining them within his own immediate power that they can not escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle, which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity, and are, therefore, say they, called *mansueta, quasi manui assueta*. But however well this notion may be founded, abstractly considered, our law apprehends the most obvious distinction to be between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man—such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law, "*revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint*." The law,

¹ Book II, p. 391.

therefore, extends this possession further than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animus revertendi*. So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for anyone else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *feræ naturæ*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words with the civil law, speaks Bracton; occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them than I have in the birds which make their nests thereon; and, therefore, if another hives them, he shall be their proprietor; but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight and have power to pursue them, and in these circumstances no one else is entitled to take them. But it hath been also said that with us the only ownership in bees is *ratione soli*, and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again, and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals; but not so if they are only kept for pleasure, curiosity, or whim; as dogs, bears, cats, apes, parrots, and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner; though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action. Yet to steal a reclaimed hawk is felony both by common law and statute; which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the King's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture. And thus much of qualified property in wild animals, reclaimed *per industriam*.

From the general doctrine thus declared no dissent will, it is believed, be anywhere found. It has been reaffirmed in many instances by the courts both of Great Britain and the United States. The special attention of the Tribunal should be given to the utterances upon this question both by judicial tribunals and by jurists of established authority, and a somewhat copious collection of them will be found in Appendix.

It will be observed that the *essential facts* which, according to these doctrines, render animals commonly designated as wild, the subjects of property not only while in the actual custody of their masters but also when temporarily absent therefrom, are those the *care and industry of man* acting upon a *natural disposition* of the animals to *return* to a place of wonted resort, secures their *voluntary* and *habitual return* to his custody and power, so as to enable him to *deal with them in a similar manner*, and to obtain from them *similar benefits*, as in the case of *domestic* animals. They are thus for all the purposes of *property* assimilated to domestic animals. It is the *nature and habits* of the animal, which enable man, by the practice of *art, care, and industry*, to bring about these *useful results* that constitute the foundation upon which the law makes its award of property, and extends to this product of human industry the protection of ownership. This species of property is well described as property *per industriam*.

The Alaskan fur-seals are a typical instance for the application of this doctrine. They are by the imperious and unchangeable instincts of their nature impelled to return from their wanderings to the *same place*; they are defenseless against man, and in returning to the same place voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals. They thus become the subjects of ordinary husbandry as much as sheep or any other cattle. All that is needed to secure this return, is the exercise of care and industry on the part of the human owner of the place of resort. He must *abstain* from killing or repelling them when they seek to return to it, and must invite and cherish such return. He must defend them against all enemies by land or sea. And in making his selections for slaughter, he must disturb them as little as possible and take *males* only. All these conditions are perfectly supplied by the United States, and their title is thus fully substantiated.

What ground of difference in respect to the point in question can

be suggested between these seals and the other animals, such as deer, bees, wild geese, and wild swans, which appear by the authorities referred to to be universally regarded as property so long as they retain the *animus revertendi*? Will it be said that this *animus* is created by man in the case of those animals, and in the seals is a natural instinct? If this were true it would be unimportant. The essential thing is that the art and industry of man should bring about the *useful result*; and to this end human art, care and industry are as necessary and as effective in the one case as in the others. If man did not *choose* to practice this care and industry in respect to the seals, if he exhibited no *husbandry*, but *treated them as wild animals*, and attacked and killed them as they sought the land, they would be driven away to other haunts or be speedily exterminated. But it is not true that the disposition to return is created by man. The habitual return of the other animals mentioned is due to their natural instincts just as much as that of the seals is to theirs. Many races of animals have what may be called *homes*. It is natural *instinct* which prompts them to return to the spot where they rear their young or can find their food or a secure place of repose. What man does in any of these instances, and as much in one as in another, is, *to act upon this instinct* and make it available to secure the return. If the seals will return to the same place and voluntarily put themselves in the power of man with less effort on his part than in the case of the other animals, it shows only that they are by nature less wild and less inclined to fly from the presence of man. In the case of the bees, for instance, it is plain that their nature is no more changed by man than that of the seals. They are as wild when dwelling in an artificial hive as when they are in the woods; nor does man feed them; they gain their food from flowers which, for the most part, belong to persons other than their masters. Will it be said that the wanderings of the seals are very distant? Of what consequence is this so long as the return is certain? Bees wander very long distances. Will it be insisted that it makes any difference on the question of property whether a cow seal goes five, or a hundred miles in the sea to obtain food to enable her to nourish her offspring on the shore? Probably the long duration of migration to the south in the winter will be urged as a striking distinction between the case of the seals and the other instances; but what difference can this make if the *animus revertendi* remains, as it unquestionably does, and the same beneficial results are secured?

The difficulty of identification may be suggested, but it does not exist. There is no commingling with the Russian herd. Every fur-seal on the Northwest coast belongs indisputably to the Alaskan herd. But if there were any such supposed difficulty, it would matter nothing. If a man, without authority, kills cattle wandering without guard over the boundless plains of the interior of the United States, he is a plain trespasser. It might be difficult for any particular owner to make out a case of damages against him, but he would be none the less a trespasser for that. If a man kills a reclaimed swan or goose innocently, and believing it to be wild, he is, indeed, excusable, and if there were different herds of fur-seals, some of them property and others not, it might be difficult to show that one who killed seals at sea had notice that they were property; but there are no herds of fur-seals in the North Pacific which are not in the same condition with those of Alaska.

It does not, therefore, appear that the differences observable between the fur-seals and those other animals commonly designated as wild, which are held by the municipal law of all nations to be the subject of ownership, are *material*, and the conclusion is fully justified that if the latter are property, the former must also be property.

But there is another and broader line of inquiry, by following which all doubt upon this point may be removed. What are the grounds and reasons upon which the institution of property stands? Why is it that society chooses to award, through the instrumentality of the law, a right of property in anything? Why is it that it makes any distinction in this respect between wild and tame animals; and why is it that, as to animals commonly designated as wild, it pronounces some to be the subjects of property and denies that quality to others? It can not be that these important but differing determinations are founded upon arbitrary reasons. Nor does the imputation to some of these animals of what is termed the *animus revertendi*, or the fact that they have a habit of returning which evidences that intent, of themselves, explain anything. They would both be wholly unimportant unless they were significant of some weighty social and economic considerations arising out of imperious social necessities. If we knew what these reasons were, we might no longer entertain even a doubt upon the question whether the Alaskan seals are the subjects of property. If it should appear upon inquiry that every reason upon which bees, or deer, or pigeons, or wild geese, and swans are held to be property requires the same determination in respect to the Alaskan seals, the differences

observable between these various species of animals must be dismissed as wholly unimportant and the conclusion be unhesitatingly received that the fur-seals are the subjects of ownership.

The attention of the tribunal is, therefore, invited to a somewhat careful inquiry into the original causes of the institution of property and the principles upon which it stands; and the counsel for the United States will be greatly disappointed if the result of the investigation should fail to satisfy the Tribunal that there is a fundamental principle underlying that institution which is decisive of the main question now under discussion. That principle they conceive to be this, *that whenever any useful wild animals so far submit themselves to the control of particular men as to enable them exclusively to cultivate such animals and obtain the annual increase for the supply of human wants, and at the same time to preserve the stock, they have a property in them*, or, in other words, whatever may be justly regarded as the product of human art, industry, and self-denial must be assigned to those who make these exertions as their merited reward.

The inquiry thus challenged is in no sense one of abstract speculation, nor is it a novel one. It proceeds upon the firm basis of the facts of man's nature, the environment in which he is placed, and the social necessities which determine his action; and the pathway is illumined by the lights thrown upon it by a long line of recognized authorities. The writers upon the law of Nature and Nations, beginning with Grotius,¹ have justly conceived that no system of practical ethics would be complete which did not fully treat of the institution of property, not only in respect to nations, but also in respect to private persons. Recognizing the fact that a nation could not defend its possessions against other nations by an appeal to any municipal law, they have sought to find grounds for the defense of those possessions in the law of nature which must be everywhere acknowledged. It is upon the broad, general principles agreed to by these authorities that we shall endeavor to establish the proposition above stated.

It is easier to feel than it is to precisely define the meaning of the word *property*; but as the feeling is substantially the same in all minds there is the less need of any attempt at exact definition. It is com-

¹ Grotius, de Jure Belli ac Pacis, Book II, chap. II; Puffendorf, Law of Nature and Nations, Book IV, chap. V. See also Blackstone's elegant chapter on "Property in General," (Commentaries, Book 2, pp. 1, *et seq.*); and Locke on Civil Government, Chap. V.

monly said to be the right to the exclusive possession, use, and disposition of the thing which is the subject of it; but this defines rather the *right* upon which property rests, than property itself. The somewhat abstract definition of Savigny more precisely states what property really is. "Property," says he, "according to its true nature, is a widening of individual power."¹ It is, as far as tangible things are concerned, an extension of the individual to some part of the material world, so that it is affected by his personality.²

But whence comes the *right* of the individual to thus extend his power over the natural world, and what are its conditions and limitations? In thus speaking of rights, *moral* rights alone are intended, for the law knows of no other, if, indeed, any other exist. There are no natural indefeasible rights which stand for their own reason. If rights exist, it is not for themselves alone, but because they subserve the happiness of mankind and the purposes for which the human race was placed upon the earth. Even the right to life, however clear in general, is not natural and indefeasible. It is held subject to the needs of mankind, and in a great number of cases may be justly taken by society. In order to ascertain the source and foundation of the right of property, we must look, as all moralists and jurists look, to the nature of man and the environment in which he is placed. We find that the desire of exclusive possession is one of the original and principal facts of man's nature which will and must be gratified, even though force be employed to vindicate the possession. We know, also, that man is a social animal and must live in *society*, and that there can not be any society without order and peace. Even in savage life it is a necessity that the hunter should have the exclusive ownership of the beast he has slain for food and of the weapon he has made for the chase. Otherwise life itself could not be maintained. His rude society, even, is not possible unless it furnishes him with some guaranty that these few possessions be secured to him. Otherwise he is at war with his species, and society is gone. The existence of property, to at least this extent, is coeval with the existence of man. It stands upon the imperi-

¹Jurid. Relations (Lond., 1834, Rattegnin's Trans.), p. 178.

²Locke expresses the same idea: "The fruit or venison which nourishes the wild Indian * * * must be his, and so his, i. e., a *part of him*, that another can no longer have any right to it," etc. (Civil Government, Ch. v, § 25.)

"In making the object my own I stamped it with the mark of my own person; whoever attacks it attacks me; the blow struck it strikes me, for I am present in it. Property is but the periphery of my person extended to things." Ihering, quoted by George B. Newcomb, Pol. Science Quarterly, vol. 1, p. 604.

ous and indisputable basis of *necessity*. "Necessity beget property."¹ Neither history, nor tradition, informs us of any people who have inhabited the earth among whom the right of property to at least this extent was not recognized and enforced. And an interesting confirmation is found in the circumstance that the rude originals of the administration of justice are everywhere found in contrivances designed for punishment of theft.

The circumstance that in the early advances of society from *savage* to industrial conditions we find that in many things, especially land and the products of land, *community* property is found to obtain in place of individual property, does not impair in any degree the force of the views just expressed. The institution of property is in full operation, whether society itself—the artificial person—asserts ownership, or permits its members to exercise the privilege. Wherever the supreme necessities of society, peace and order, are found to be best subserved by ownership in the one form rather than in the other, the form most suitable will be adopted. Community property was found sufficient for the early stages of society, and it is the anticipation, or the dream, of many ingenious minds that the expedient will again, in the further advance of society, be found necessary.

But the desire of human nature for exclusive ownership is not limited to the weapons and product of the chase, as in *savage* society, or to the reward of a proportional share, as in early industrial communities. Man wishes for more, for the sake of the comfort, power, consideration and influence which abundant possessions bring. He wishes to better his condition, and this is possible only by increase of possessions. And the improvement of society, it has been found, can be effected, or best effected, only through the improvement of its individual members. This desire of individual man to better his condition is imperious, and must be gratified; and inasmuch as the gratification tends to general happiness and improvement, a moral basis is furnished for an extension of the institution of individual property. As the first necessity of the social state, peace and order, require that ownership should be enforced to at least the limited extent which *savage* conditions require, so the second necessity of society, its progress and advancement—that is to say, civilization—demands that individual effort should be encouraged by offering as its reward the exclusive ownership of everything which it can produce. In these two principal neces-

¹ Blackstone's Com., Book 2, p. 8.

sities of human condition, the peace of society, and its progress and advancement in wealth and numbers, both founded upon the strongest desires of man's nature, the institution of property has its foundation.

There are several features of this institution which in this discussion should be well understood and carried in mind; and, first, the extent of its operation. Manifestly this must be coextensive with the human desires and necessities out of which it springs. Wherever there is an object of desire, not existing in sufficient quantity to fully satisfy the greed of all, conflict for possession will arise and consequent danger to peace. Society finds its best security for order in extending the privilege of ownership *to everything which can be owned*. The owner may be the state or community, as under early and rude social conditions; or private individuals, as civilization advances; but, in either case, nothing is left as a subject for strife. The grounds and reasons which society, after the introduction of individual property, may allow as sufficient for awarding ownership to one rather than to another are various; but they all depend upon some consideration of superior merit and desert. That one man has by his labor and skill formed a weapon or a tool is instantly recognized as a sufficient ground to support his title to it. And if he simply takes possession of some things before unappropriated by any one, or finds property to which no other owner asserts a claim, his right, though less impressive, is still superior to that of any other. We therefore easily reach the conclusion that the necessities which demand the institution of property equally demand its extension over every object of desire as to which conflict for possession may arise.

But it is not only the necessity of peace and order which requires that all-embracing extent of the institution of property. It is alike demanded by that high moral purpose already alluded to as constituting part of the foundation of the institution, namely, the improvement of society and of the individual man. This, as has already been seen, can be brought about only by the cultivation of the arts of industry by which nature is made to yield a more abundant provision for human wants. These arts will not be practiced unless the fruits of each man's labor, whether it be the product of the field, of the workshop, or the increase of animals which are the subject of his care, are assured to him. We find, therefore, that the institution of property is so imbedded in the nature of man, that its existence is a necessary consequence of forces in operation wherever man is found, or wheresoever his power

may extend, and that the fundamental formula by which the institution is expressed is that every object of desire, *of which the supply is limited*, must be owned. It is with this proposition that Blackstone closes his chapter upon "Property in General."

"Again, there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would frequently be found without a proprietor had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands. Such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the sovereign of the State, or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing *that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner.*"¹

¹ Sir Henry Maine, after tracing with his wonted acuteness the course of the development of the conception of property, also finds that it finally results in the proposition that everything must be owned.

"It is only when the rights of property gained a sanction from long practical inviolability, and when the vast majority of objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginning of civilization. The true basis seems to be not an instinctive bias towards the institution of property, but a presumption, arising out of the long continuance of that institution, that *everything ought to have an owner*. When possession is taken of a '*res nullius*,' that is, of an object which is not, or has never, been reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally subjects as an exclusive enjoyment, and that in the given case there is no one to invest with the rights of property except the occupant. The occupant, in short, becomes the owner, because all things are presumed to be somebody's property, and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing." (Ancient Law, Ch. VIII, p. 249.)

Lord Chancellor Chelmsford made the proposition that every thing must be owned by some one, the ground of his decision in the House of Lords of the case of *Blades v. Higgs*. (Law Journal Reports, N. S. 286, 288.)

From Commentaries on the Constitutional Law of England. By George Bowyer, D. C. L., 2d ed. London, 1846, p. 427:

"III. The third primary right of the citizen is that of property, which consists in the free use, enjoyment, and disposal of all that is his, without any control or diminution, save by the law of the land. The institution of property—that is to say, the appropriation to particular persons and uses of things which were given by God to all mankind—is of natural law. The reason of this is not difficult to discover, for the increase of mankind must soon have rendered community of goods exceedingly

Nothing which is not an object of human desire—that is, nothing which has not a recognized utility—can be the subject of property, for there is no possibility of conflict for the possession. Property, therefore, is not predicable of noxious reptiles, insects, or weeds, except under special circumstances, where they may be kept for the purposes of science or amusement. The supply, indeed, may be limited; but the element of utility, which excites the conflicting desires which property is designed to reconcile and restrain, is absent. Nor is property predicable of things which, though in the highest degree useful, exist in inexhaustible abundance and within the reach of all. Neither air nor light nor running water are the subjects of property. The supply is unlimited, and where there is abundance to satisfy all desires there can be no conflict.

There is a still further qualification of the extent to which the institution of property is operative. Manifestly, in order that a thing may be owned, it must be *susceptible of ownership*, that is, of exclusive appropriation to the power of some individual. There are things of which this can not be asserted. Useful wild animals are the familiar instance. Although objects of desire and limited in supply, they are not, as a general rule, susceptible of exclusive appropriation. They are not subject, otherwise than by capture and confinement, to the constant disposition of man as he may choose to dispose of them. We can hold them only by keeping them in captivity, and this we can do only in respect to an insignificant part. *What, in the view of the law, constitutes this susceptibility of exclusive appropriation* is an interesting and important question, which will be hereafter discussed in connection with the question what animals are properly to be denominated as wild.

The importance of the conclusion reached by the foregoing reasoning should be marked by deliberate restatement. The institution of property embraces all tangible things subject only to these three excepting conditions:

First. They must have that *utility* which makes them objects of human desire.

Second. The supply must be limited.

Third. They must be susceptible of exclusive appropriation.

inconvenient or impossible consistently with the peace of society; and, indeed, by far the greater number of things can not be made fully subservient to the use of mankind in the most beneficial manner unless they be governed by the laws of exclusive appropriation."

This conclusion is a deduction of moral right drawn from the facts of man's nature and the environment in which he is placed; in other words, it is a conclusion of the law of nature; but this, as has been heretofore shown, is international law, except so far as the latter may appear, from the actual practice and usages of nations, to have departed from it, or, to speak more properly, not to have risen to it.

Turning to the actual practice of nations, that is, to the observed fact, we find that it is in precise accordance with the deductive conclusion. No tangible thing can be pointed out, which exhibits the conditions above stated, which is not by the jurisprudence of all civilized nations pronounced to be the subject of property, and protected as such. This seems so manifest as to justify a confidence that the assertion will not be disputed.

In the foregoing reasoning no distinction has been observed between ownership by private individuals under municipal law, and by nations under international law. There is no distinction. Nations are but aggregates of individual men. They exhibit the same ambitions, are subject to like perils, and must resort for safety and peace to similar expedients. Just as it is necessary to the peace, order, and progress of municipal societies that everything possessing the three characteristics above enumerated should be owned by some one, so also it is necessary to the peace, order, and progress of the larger society of nations that everything belonging to the same class, but which from its magnitude is incapable of individual ownership, should be owned by some nation. This truth is well illustrated by the practice of nations for the last four centuries in acknowledging as valid titles to vast tracts of the earth's surface upon no other foundation than first discovery. Nearly the whole of the American continents was parceled out among European nations by the recognition of claims based upon such titles alone.¹

¹ The practice and doctrine of European nations upon this subject are clearly set forth by Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in *Johnson vs. McIntosh* (8 Wheat., 543, 572.) A short extract will be pertinent here:

"As the right of society to prescribe those rules by which property may be acquired and preserved is not, and can not be, drawn into question; as the title to lands, especially, is, and must be admitted, to depend entirely on the law of the nation in which they lie, it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice which the Creator of all things has impressed on the mind of his creature, man, and which are admitted to regulate in a great degree the rights of civilized nations, whose perfect independence has been acknowledged, but those principles also which our own Government has adopted in the particular case, and given as the rule of decision.

"On the discovery of this immense continent, the great nations of Europe were

And, for the most part, the vast territories thus acquired were not even seen. The maritime coasts only were explored, and title to the whole interior, stretching from ocean to ocean, or at least to the sources of the rivers emptying upon the coasts explored, was asserted upon the basis of this limited discovery. Some limitations were placed upon these vast claims resulting from conflicts in the allegations of priority; but, for the most part, the effectiveness of first discovery in giving title to great areas which had not been even explored was recognized. If the mere willing by the first discoverer that things susceptible of appropriation should be his property was held sufficient to make them so, it could only have been from a common conviction that ownership of every part of the earth's surface by some nation was so essential to the general peace and order, that it was expedient to recognize the slightest moral foundation as sufficient to support a title. The principle has been extended to vast territories which are even incapable of human occupation. The titles of Great Britain to her North American territory extending to the frozen zone, and of the United States derived from Russia to the whole territory of Alaska have never been questioned.

THE FORM OF THE INSTITUTION—COMMUNITY AND PRIVATE PROPERTY.

But although the existence of human society involves and necessitates the institution of property, it does not determine the *form* which that institution assumes. The necessity that all things susceptible of ownership should be owned is one thing; but who the owner shall be

eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent afforded an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the governments by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented."

is another. As has already been pointed out, the absolute necessities of rude society may be satisfied by making society itself the universal owner; which is the condition actually presented by some very early communities; but individual ownership is the condition found in all societies which have reached any considerable degree of advancement. This matter of the form of the institution is, of course, determined in a municipal society by its laws; and these are in turn determined by its *morality*. Ownership is awarded in accordance with the sense of right and fitness which prevails among the members of society. It is this which determines its will, and its will is its law.

In seeking for the moral grounds upon which to make its award of the rights of private ownership that which is first and universally accepted is what may be called *desert*. "*Suum cuique tribuere*," lies as an original conception at the basis of all jurisprudence. In respect to *land* indeed, an original grant may be required from the community or the sovereign; but whatever a man *produces* by his *labor*, or *saves* by the practice of *abstinence*, is justly reserved for his exclusive use and benefit. This is the principle upon which the right of private property is by the great majority of jurists placed; and it is often, somewhat incorrectly perhaps, made the foundation of the institution of property itself. In our view a distinction is observable between the institution itself and the form which it assumes. The first springs from the necessity of peace and order, society not being possible without it; but when private property, which is also the result of another necessity, namely, the demands of civilized life, becomes the form which the institution assumes, the principle of *desert* comes into operation to govern the award.

OWNERSHIP NOT ABSOLUTE.

But what is the *extent* of the dominion which is thus given by the law of nature to the owner of property? This question has much importance in the present discussion and deserves a deliberate consideration.

In the common apprehension the title of the possessor is absolute, and enables him to deal with his property as he pleases, and even, if he pleases, to destroy it. This notion, sufficiently accurate for most of the common purposes of life, and for all controversies between man and man, is very far from being true. No one, indeed, would assert that he had a *moral* right to waste or destroy any useful thing; but this limitation of power is, perhaps, commonly viewed as a mere moral or

religious precept, for the violation of which man is responsible only to his Maker, and of which human law takes no notice. The truth is far otherwise. This precept is the basis of much municipal law, and has a widely-reaching operation in international jurisprudence. There are two propositions belonging to this part of our inquiry, closely connected with each other, to which the attention of the Arbitrators is particularly invited. They will be found to have a most important, if not a wholly decisive, bearing upon the present controversy.

First. No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.

Second. The title is further limited. The things themselves are not given him, but only the *usufruct* or *increase*. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.

The first of these propositions is stated almost in the language employed by one of the highest authorities on the law of nature and nations. Says Puffendorf, "God gave the world, not to this, nor to that man, but to the human race in general."¹ The bounties of nature are gifts not so much to those whose situation enables them to gather them, but to those who need them for *use*. And Locke, "God gave the world to men in common."² If it be asked how this gift in common can be reconciled with the exclusive possession which the institution of property gives to particular nations and particular men, the answer is by the instrumentality of commerce which springs into existence with the beginnings of civilization as a part of the order of nature. Indeed it is only by means of commerce that the original *common gift* could have been made effectual as such. Every bounty of nature, however it may be gathered by this, or that man, will eventually find its way, through the instrumentality of commerce, to those who want it for its inherent qualities. It is for these, wherever they may dwell, that it is destined. Were it not for these the bounty would be of little use even to those whose situation enables them to control it and to gather it. But for commerce, and the exchanges effected by it, the greatest part of the wealth of the world would be wasted, or unimproved.³ The Alaskan seals, for instance,

¹ Law of Nature and Nations. Book iv, Chap. v, sec. 9.

² Civil Government, Chap, v, § 34.

³ "Wherewith accords that of Libanius, God, saith he, hath not made any one part of the world the storehouse of all his blessings, but hath wisely distributed

would be nearly valueless. A few hundreds, or thousands at the most, would suffice to supply all the needs of the scanty population living on the islands where they are found, or along the shores of the seas through which they pass in their migrations. Indeed, the Pribilof Islands would never have been inhabited, or even visited, by man except for the purpose of capturing seals in order to supply the demands of distant peoples. The great blessing to mankind at large capable of being afforded by this animal would have been wholly unrealized. The sole condition upon which its value depends, even to those who pursue and capture it, is that they are able, by exchanging it for the products of other and distant nations, to furnish themselves with many blessings which they greatly desire.

This truth that nature intends her bounties for those who need them, wherever they may dwell, may be illustrated and made more clear by inquiring upon whom the loss would fall if the gift were taken away. Take, for instance, the widely used and almost necessary article of India rubber. It is produced in but few and narrowly-limited areas, and we may easily suppose that by some failure of nature, or misconduct of man, the production is arrested. A loss would, no doubt, be felt by those who had been engaged in gathering it and exchanging it for other commodities; and a still more extensive one would fall upon the largely greater number whose labor was applied in manufacturing it into the various forms in which it is used; but the loss to both these classes would be but temporary. The cultivators could raise other products, and the manufacturers could employ their industry in other fields. The opportunities which nature offers for the employment of labor are infinite and inexhaustible, and the only effect of a cessation of one industry is to turn the labor devoted to it into other channels. But the loss to the consumers of the article, the loss of those who need that particular thing, would be absolute and irreparable.

If these views are well founded it follows that, by the law of nature, every nation, so far as it possesses the fruits of the earth in a measure more than sufficient to satisfy its own needs, is, in the truest sense, a

them through all nations, that so each needing another's help he might thereby lead men to society; and to this end he discovered unto them the art of merchandising, that so whatsoever any nation produced might be communicated unto others."

* * * So Theseus speaks very pertinently—

"What to one nation nature doth deny,
That she, from others, doth by sea supply."

(Grotius; *De Jure Belli ac Pacis*, Book II, Chap. II, § 13.) See also Phillimore, *international Law*, vol. I, p. 261, 262.

trustee of the surplus for the benefit of those in other parts of the world who need them, and are willing to give in exchange for them the products of their own labor; and the truth of this conclusion and of the views from which it is drawn will be found fully confirmed by a glance at the approved usages of nations. It is the characteristic of a trust that it is *obligatory*, and that in case of a refusal or neglect to perform it, such performance may be compelled, or the trustee removed and a more worthy custodian selected as the depository of the trust. It is an admitted principle of the law of nature that commerce is obligatory upon all nations; that no nation is permitted to seclude itself from the rest of mankind and interdict all commerce with foreign nations. Temporary prohibition of commerce for special reasons of necessity are, indeed, allowed; but they must not be made permanent.¹

¹ The instrumentality of commerce as a part of the scheme of nature in securing to mankind in general the enjoyment of her various gifts, in whatsoever quarter of the earth they may be found, has been pointed out by many writers upon the law of nature and nations. A few citations will be sufficient, the views in which all concur. It will appear from those which are herein furnished—

1. That man does not begin to desire the benefit of the gifts to be found in other lands and in which he is entitled to share until he has made some advances towards civilization, and, consequently, commerce may be said to be the offspring of civilization.

2. But it reacts upon and greatly stimulates the cause from which it springs, so that civilization may also be said to be the fruit of commerce.

3. In its relations to civilization it is like the division of labor and has sometimes been styled "the territorial division of labor."

4. Doubtless there is a large discretion which each nation may justly exercise in respect of the conditions under which it will engage in commerce with other nations. But an absolute or unreasonable refusal is in clear violation of natural law. It is a denial by the refusing nation of the fundamental truth that the bounties of nature were bestowed upon mankind.

From "Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime," par L. B. Hautefeuille. Paris, 1848. Vol. I, p. 256:

"The Sovereign Master of nature did not confine himself to giving a particular disposition to every man; he also diversified climates and the nature of soils. To each country, to each region, he assigned different fruits and special productions, all or nearly all of which were susceptible of being used by man and of satisfying his wants or his pleasures. Almost all regions doubtless produced what was indispensable for the sustenance of their inhabitants, but not one produced all the fruits that were necessary to meet all real needs, or more particularly all conventional needs. It was, therefore, necessary to have recourse to other nations and to extend commerce. Man, impelled by that instinct which leads him to seek perfection, created new needs for himself as he made new discoveries. He accustomed himself to the use of all the productions of the earth and of its industry. The cotton, sugar, coffee, and tobacco of the New World have become articles of prime necessity for the European, and an immense trade is carried on in them. The American, in turn, can not dispense with the varied productions of European manufacture. The development of commerce, that is to say, the satisfaction of man's instincts of sociability and perfectibility, has greatly contributed to connecting all the nations

A sure guaranty for the observance of this trust obligation is found in the imperious and universal motive of self-interest. The desire of civilized man to gratify his numerous wants and to better his condition so strongly impels him to commerce with other nations that no other inducement is in general needed. The instances in history are rare in which nations have exhibited unwillingness to engage in commercial intercourse; but they are possible under peculiar conditions, and have sometimes actually occurred. Such a refusal is generally believed to have been the real, though it was not the avowed, cause of the war waged by Great Britain against China in 1840.

For the purposes of further illustration, a case may be imagined stronger than any of the actual instances referred to. Let it be supposed that some particular region from which alone a commodity deemed

of the universe; it has served as a vehicle, so to speak, for the performance of the duties of humanity. Commerce is really, therefore, an institution of primitive law; it has its source and its origin in the divine law itself."

From Vattel (7th Amer. Ed., 1849, Bk. II, ch. II, sec. 21, p. 143):

"SEC. 21. All men ought to find on earth the things they stand in need of. In the primitive state of communion they took them wherever they happened to meet with them if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right, and, consequently, it can not take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent, nor are they usually to be had for nothing, but they may be bought or exchanged for other things of equal value. *Men are, therefore, under an obligation to carry on that commerce with each other if they wish not to deviate from the views of nature*, and this obligation extends also to *whole nations or states*. It is seldom that nature is seen in one place to produce everything necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, etc. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than for another, as, for instance, fitter for the vine than for tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its lands and its industry in the most advantageous manner, and mankind in general prove gainers by it. Such are the foundations of the general obligations incumbent on nations reciprocally to cultivate commerce."

From "Leçons de Droit de la Nature et des Gens," par M. le Professeur Félice, Vol. II. (Droit des Gens). Paris, 1830. Leçon XVII, page 293:

"The need of this exchange is based upon the laws of nature and upon the wise arrangement which the Supreme Being has established in the world, each region and each portion of which furnishes, indeed, a great variety of productions, but also lacks certain things required for the comfort or needs of man; this obliges men to exchange their commodities with each other and to form bonds of friendship,

necessary by man everywhere, such as Peruvian bark, could be procured, was within the exclusive dominion of a particular power, and that it should absolutely prohibit the exportation of the commodity; could there be any well-founded doubt that other nations would be justified, under the law of nature, in compelling that nation by arms to permit free commerce in such commodity?

And this trust, of which we are speaking, is not limited to that surplus of a nation's production which is not needed for its own wants, but extends to its means and capabilities for production. No nation has, by the law of nature, a right to destroy its sources and means of production or leave them unimproved. None has the right to convert any portion of the earth into a waste or desolation, or to permit any part which may be made fruitful to remain a waste. To destroy the source from which any human blessing flows is not merely an error, it

whereas, otherwise, their passions would impel them to hate and destroy each other. * * *

"The law of commerce is therefore based upon the obligation under which nations are to assist each other mutually, and to contribute, as far as lies in their power, to the happiness of each other."

From Levi (International Commercial Law, 2d ed., 1863. Vol. I, Preface, pp. xxxix, xl):

* * * "Commerce is a law of nature, and the right of trading is a natural right. (*) But it is only an imperfect right, inasmuch as each nation is the sole judge of what is advantageous or disadvantageous to itself; and whether or not it be convenient for her to cultivate any branch of trade, or to open trading intercourse with any one country. Hence it is that no nation has a right to compel another nation to enter into trading intercourse with herself, or to pass laws for the benefit of trading and traders. Yet the refusal of this natural right, whether as against one nation only, or as against all nations, would constitute an offense against international law, and it was this refusal to trade, and the exclusion of British traders from her cities and towns, that led to the war with China.

From Halleck (International Law (Ed. 1861), Ch. XI, sec. 13, p. 280):

"SEC. 13. To this right of trade there is a corresponding duty of mutual commerce, founded on the general law of nature; for, says Vattel, 'one country abounds in corn, another in pastures and cattle, a third in timber and metals; all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than another; as for vineyards more than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its industry and its ground in the most advantageous manner, and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce. Therefore, everyone is not only to join in trade as far as it reasonably can, but even to countenance and promote it.'"

Reddie (Inquiries into International Law. 2d Ed. 1851, Ch. v., Pt. II., sub sec. ii., Art. II, p. 207):

"But the chief source of the intercourse of nations in their individual capacity

* Vattel, b. I, ch. 3, sec. 88.



is a *crime*. And the wrong is not limited by the boundaries of nations, but is inflicted upon those to whom the blessing would be useful wherever they may dwell. And those to whom the wrong is done have the right to redress it.

Let the case of the article of India rubber be again taken for an illustration, and let it be supposed that the nation which held the fields from which the world obtained its chief supply should destroy its plantations and refuse to continue the cultivation, can it be doubted that other nations would, by the law of nature, be justified in taking possession by force of the territory of the recreant power and establishing over it a governmental authority which would assure a continuance of the cultivation? And what would this be but a removal of the unfaithful trustee, and the appointment of one who would perform the trust?¹

is the exchange of commodities, or natural or artificial production. The territory of one State very rarely produces all that is requisite for the supply of the wants, for the use and enjoyment of its inhabitants. To a certain extent one state generally abounds in what others want. A mutual exchange of superfluous commodities is thus reciprocally advantageous for both nations. And, as it is a moral duty in individuals to promote the welfare of their neighbor, it appears to be also the moral duty of a nation not to refuse commerce with other nations when that commerce is not hurtful to itself."

From Kent (Commentaries on American Law. (The Law of Nations, part 1.) Ed. 1866. Ch. II., p. 117).

"As the aim of international law is the happiness and perfection of the general society of mankind, it enjoins upon every nation the punctual observance of benevolence and good will, as well as of justice toward its neighbors. This is equally the policy and the duty of nations. They ought to cultivate a free intercourse for commercial purposes, in order to supply each other's wants and promote each other's prosperity. The variety of climates and productions on the surface of the globe, and the facility of communication by means of rivers, lakes, and the ocean, invite to a liberal commerce, as agreeable to the law of nature, and extremely conducive to national amity, industry, and happiness. The numerous wants of civilized life can only be supplied by mutual exchange between nations of the peculiar productions of each."

¹Cases in which nations have supposed themselves justified in *interfering* with the territory and affairs of other nations have frequently occurred. The war celebrated in Grecian history as the first Sacred War was an early and illustrative instance growing out of the religious sentiment. The temple of Apollo at Delphi was the principal shrine in the religion of Greece. It was within the territory of the state of Krissa, whose people had desecrated by cultivation the surroundings of the spot where it was situated, and by levying tolls and other exactions had obstructed the pilgrimages which the votaries of the god were wont to make. A large part of Greece arose to punish this violation of the common right, and in a war of ten years' duration destroyed the town of Krissa, and consecrated the plain around the temple to the service of the god by decreeing that it should forever remain untilled and unplanted. (Grote, History of Greece, Lond., 1817, vol. IV, p. 84.) China has furnished one of the few instances in modern times of unwillingness to engage in foreign commerce. This was not the avowed but was probably one of the real causes of the war waged against that nation by Great Britain in 1840.

It is, indeed, upon this ground, and this ground alone, that the conquest by civilized nations of countries occupied by savages has been, or can be, defended. The great nations of Europe took possession by force and divided among themselves the great continents of North and South America. Great Britain has incorporated into her extensive empire vast territories in India and Australia by force, and against the will of their original inhabitants. She is now, with France and Germany as rivals, endeavoring to establish and extend her dominion in the savage regions of Africa. The United States, from time to time, expel the native tribes of Indians from their homes to make room for their own people. These acts of the most civilized and Christian nations are inexcusable robberies, unless they can be defended, under the law of nature, by the argument that these uncivilized countries were the gifts of nature to man, and that their inhabitants refused, or were unable, to perform that great trust, imposed upon all nations, to make the capabilities of the countries which they hold subservient to the needs of man. And this argument is a sufficient defense, not indeed for the thousand excesses which have stained these conquests, but for the conquests themselves.

The second proposition above advanced, namely, that the title which nature bestows upon man to her gifts is of the *usufruct* only, is, indeed, but a corollary from that which has just been discussed, or rather a part of it, for in saying that the gift is not to this nation or that, but to mankind, all generations, future as well as present, are intended. The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to *use* the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants.¹ The title of each generation may be described in a term familiar

¹ Since the power of man over things extends no further than to use them accordingly as they are in their nature usable, things are not matter for consideration in law except in regard to the use or treatment of which they are capable. Hence no right to things can exist beyond the right to use them according to their nature; and this right is Property. No doubt a person can wantonly destroy a subject of property, or treat it in as many ways which are rather an abuse than a use of the thing. But such abuse is wasteful and immoral; and that it is not at the same time illegal, is simply because there are many duties of morality which it is impossible, inexpedient, or unnecessary for the positive law to incorporate or enforce. I therefore define property to be the right to the exclusive *use* of a thing.

It will, perhaps, be objected to this that if gathering the acorns, or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will.

to English lawyers as limited to an estate for life; or it may with equal propriety be said to be coupled with a trust to transmit the inheritance to those who succeed in at least as good a condition as it was found, reasonable use only excepted. That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation. The great writers upon the law of nature and nations properly content themselves with simply affirming, without laboring to establish, these self-evident truths.

The obligation not to invade the stock of the provision made by nature for the support of human life is in an especial manner imposed upon *civilized* societies; for the danger proceeds almost wholly from them. It is commerce, the fruit of civilization, and which at the same time extends and advances it, that subjects the production of each part of the globe to the demands of every other part, and thus threatens, unless the tendency is counteracted by efficient husbandry, to encroach upon the sources of supply. The barbaric man with sparse numbers scattered over the face of the earth, with few wants, and not engaged in commerce, makes but a small demand upon the natural increase. He never endangers the existence of the stock, and neither has, nor needs, the intelligent foresight to make provision for the future. But with the advance of civilization, the increase in population, and the multiplication of wants, a peril of overconsumption arises, and along with it a development of that prudential wisdom which seeks to avert the danger.

The great and principal instrumentality designed to counteract this threatening tendency is the institution of *private individual property*, which, by holding out to every man the promise that he shall have the exclusive possession and enjoyment of any increase in the products of nature which he may effect by his care, labor, and abstinence, brings into play the powerful motive of self-interest, stimulates the exertion in every direction of all his faculties, both of mind and body, and thus


To which I answer: Not so. The same law of nature that does by this means give us property, does also bound that property too. "God has given us all things richly," (1 Tim. vi, 17,) is the voice of reason confirmed by inspiration. But how far has he given it to us? To enjoy. As much as any one can make use to any advantage of life before it spoils, so much he may by his labor fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. (S. Martin Leaks, Jurid. Soc. Papers, Vol. 1, p. 532.)

leads to a prodigiously increased production of the fruits of the earth.

There are some provisions to this end which are beyond the power of private men to supply, or for supplying which no sufficient inducement can be held out to them, inasmuch as the rewards can not be secured to them exclusively; and here the self-interest of nations supplements and coöperates with that of individuals. A large share of the legislative policy of civilized states is devoted to making provision for future generations. Taxation is sought to be limited to the annual income of society. Permanent institutions of science are established for the purpose of acquiring a fuller knowledge of natural laws, to the end that waste may be restricted, the earth be made more fruitful, and the stock of useful animals increased. The destruction of useful wild animals is sought to be prevented by game laws, and the attempt is even made to restock the limitless areas of the seas with animal life which may be made subservient to man.

The same policy is observable in the ordinary municipal law of states. Whenever the possessor of property is incapable of good husbandry, and therefore liable to waste or misapply that part of the wealth of society which is confided to him, he is removed from the custody, and a more prudent guardian substituted in his place. Infants, idiots, and insane persons are deprived of the control of their property, and the state assumes the guardianship. This policy is adopted not merely out of regard to the private interests of the present owner, but in order also to promote the permanent objects of society by protecting the interests of future generations.

There are some exceptions, rather apparent than real, to the law which confines each generation to the increase or usufruct of the earth. Nature holds in some of her storehouses the slow accumulations of long preceding ages, which can not be reproduced by the agency of man. The products of the mineral kingdom, when consumed, can not be restored by cultivation. But here the operation of the institution of private property is still effective, by exacting the highest price, to limit the actual consumption to the smallest extent consistent with a beneficial use. Again, it is not possible to limit the consumption of useful wild birds to the annual increase; for they can not be made the subjects of exclusive appropriation as property, and consequently can not be increased in numbers by the care and abstinence of individual man. The motive of self-interest can not here be brought into play. But society still makes the only preservative effort



in its power by restricting consumption through the agency of game laws.

So, also, in the case of fishes inhabiting the seas and reproducing their species therein. It is impossible to limit the extent to which they may be captured; but here nature, as if conscious of the inability of man to take care of the future, removes the necessity, in most cases, for such care by the enormous provision for reproduction which she makes. The possible necessity, however, or the wisdom of endeavoring to supplement the provision of nature, has already been taken notice of by man, and efforts are now in progress to prevent an apprehended destruction of the stock. The case of fishes resorting, for the purposes of reproduction, to interior waters, has, for a long time, engaged the attention of governments, and much success has followed efforts to make the annual increase adequate to human wants.

SUMMARY OF DOCTRINES ESTABLISHED.

The foregoing discussion concerning the origin, foundation, extent, form, and limitations of the institution of property will, it is believed, be found to furnish, in addition to the doctrines of municipal law, decisive tests for the determination of the principal question, whether the United States have a property in the seal herds of Alaska; but it may serve the purposes of convenience to present, before proceeding to apply the conclusions thus reached, a summary of them in a concise form.

First. The institution of property springs from and rests upon two prime necessities of the human race:

1. The establishment of peace and order, which is necessary to the existence of any form of society.
2. The preservation and increase of the useful products of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilized society.

Second. These reasons, upon which the institution of property is founded, require that every *useful* thing, the supply of which is *limited*,

and which is capable of ownership, should be assigned to some legal and determinate owner.

Third. The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:

1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the *enjoyment*.

2. As a corollary or part of the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof.¹

APPLICATION OF THE FOREGOING PRINCIPLES TO THE QUESTION OF PROPERTY IN THE ALASKAN HERD OF SEALS.

In entering upon the particular discussion whether, upon the principles above established, the United States have a property interest in the seal herd, it is obvious that we must have in mind a body of facts which have not, as yet, been fully stated.

We were obliged, indeed, while showing that the seals must be regarded as the subjects of property under the settled and familiar rules of municipal law, to briefly point out that the question whether they were, under that law, the subjects of property depended upon their nature and habits, and not upon whether they were to be classed under one or the other of the vague and uncertain general divisions of *wild* and *tame*; and also that they had, as part of their nature and habits, all the essential qualities upon which that law had declared several other descriptions of animals commonly designated as wild to be, nevertheless, the subjects of property. But this brief description is not sufficient for the purposes of the broader argument upon which we are now engaged. We should have in mind a complete knowledge of every material fact connected with these animals.

¹ In the foregoing discussion, which involves only the most general principles, and concerning which there is little controversy, we have avoided frequent reference to authorities in order not to interrupt the attention. But an examination of the authorities should not be omitted. To facilitate this, somewhat copious citations are gathered and arranged in the Appendix to this portion of the argument.



The first step, therefore, in the further progress of our argument must be to assemble more precisely and fully our information concerning the utility of these animals, their nature and habits, the modes by which they are pursued and captured, the danger of extermination to which they are exposed, from what modes of capture that danger arises, whether it is capable of being averted, and by what means. We proceed, therefore, to place before the learned Arbitrators a concise statement of the facts bearing upon these points.

And first, concerning their *utility*. That they belong to the class of useful animals is, of course, a conceded fact; but in this general admission the extent of the utility, the magnitude of the blessing which they bring to man, may not be adequately estimated. They are useful for food, and constitute a considerable part of the provision for this purpose which is available to many of the native tribes of Indians who inhabit the coasts along which their migrations extend. They are absolutely necessary for this purpose to the small native population of the Pribilof Islands. These could not subsist if this provision were lost. They are useful for the oil which they afford; but their principal utility consists in their skins, which afford clothing, not only to the native tribes above mentioned, but, when prepared by the skill which is now employed upon them, furnish a garment almost unequalled for its comfort, durability, and beauty. There is, indeed, no part of the animal which does not subserve some human want. The eagerness with which it is sought, and the high price which the skins command in the markets of the world, are further proof of its exceeding utility. Its prodigious numbers, even after the havoc which has been wrought by the relentless war made upon it by man, exhibit the magnitude of the value of the species; and if we add to these numbers, as we justly may, the increase which would come if its former places of resort, which have been laid waste by destructive pursuit, should be again, by careful and protected cultivation, repopled, the annual supply would exceed the present yield perhaps tenfold.

Leaving out of view here the unlawful character of the employment, we may say that there is a further utility in the employment given to human labor in the pursuit and capture of the animal and the manufacture of the skins. There are probably two thousand persons employed for a large part of the year in the taking of seals at sea, and a large number in the building of the vessels and making of the implements required in that occupation. A much larger number, principally

inhabitants of Great Britain, are wholly employed in the preparation of the skins for market. The annual value of the manufactured product can scarcely be less than \$5,000,000 or \$6,000,000.

But this last mentioned utility, that which arises from the employment given to industry, is not absolute and permanent. If the industry were destroyed by the total destruction of the seals, some inconvenience would doubtless be felt before the labor could be diverted into other channels. It could, however, and would, be so diverted, and the loss would thus be repaired. But, as already observed, the case would be different with the loss inflicted upon those who *use* the skins. No substitute could supply this loss; nor would there be any corresponding gain. In the case of some useful wild animals, the American bison, for instance, which inhabit the earth and subsist upon its fruits, and which are necessarily exterminated by the occupation of the wild regions over which they roam, there is a more than compensating advantage in the more numerous herds of tamed animals which subsist upon the same food. But the seal occupies no soil which would otherwise be useful. The food upon which it subsists comes from the illimitable storehouses of the seas, and could not otherwise be made productive of any distinct utility.

We are next to take into more particular consideration the *nature and habits* of the seal, and the other circumstances above adverted to which enable us to measure the perils to which the existence of the race is exposed, and the means by which these may be best counteracted. It is here that we encounter, for the first time, any material contradiction and dispute in the evidence; and, inasmuch as it is in a high degree important that we should ascertain the precise truth upon these points, it should be clearly understood what evidence is really before the arbitrators, and what measure of credit and weight should be allowed to the different classes of evidence. Any critical and detailed discussion of the evidence, if incorporated into the body of the argument, might involve interruptions too much protracted in the chain of reasoning, and will, for that reason, be separately presented in appendices; but some general notion should be had at the outset of the relative importance of the various pieces of evidence.

First. There is a large body of *common knowledge* respecting the natural history of animals and the facts of animal life, which all intelligent and well educated minds are presumed to possess. In the absence of those facilities, such as municipal tribunals afford for the pro-

duction and examination of witnesses, it is supposed by the undersigned that this common knowledge may, with large latitude, be deemed to be already possessed by the learned Arbitrators, and to be available in the discussion and decision of the controversy.

Second. In the next place this knowledge may be supplemented by an appeal to the authoritative writings of scientific and learned men, and also to the writings of trustworthy historians and of actual observers of the facts which they relate.

Third. The reports, both joint and separate, of the Commissioners appointed in pursuance of the ninth article of the Treaty, are, by the terms of the Treaty, *made* evidence, and were undoubtedly contemplated as likely to furnish most important and trustworthy information.

Fourth. The testimony of ordinary witnesses, actual observers of the facts to which they testify. This is contained in *ex parte* depositions, but must, notwithstanding, be received as competent. No mode having been provided by which witnesses could be subjected to cross-examination, these depositions must be accepted as belonging to the class of best obtainable evidence. The necessity of caution and scrutiny in the use of it is manifest; but it may be found to be of great value, depending upon the number of concurring voices, and the degree of intelligence and freedom from bias which may be exhibited.

Concerning the reports of the Commissioners, some observations are appropriate in this place. Their duties were defined in concise but very clear language in the ninth article of the Treaty, as follows:

Each Government shall appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts having relation to seal life in Bering Sea, and the measures necessary for its proper protection and preservation.

The four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.

They found themselves unable to agree, except upon a very few points, the most important of which are expressed in the following language:

5. We are in thorough agreement that, for industrial as well as for other obvious reasons, it is incumbent upon all nations, and particularly upon those having direct commercial interests in fur-seals, to provide for their protection and preservation. * * *

7. We find that since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof Islands has taken place; that it has been cumulative in effect, and that it is the result of excessive killing by man.¹

¹ Case of the United States, p. 309.

These gentlemen were, some of them at least, men eminent in the world of science, and acknowledged experts upon the subject committed to them for examination. The language of the treaty simply called for their opinions and advice upon a question mainly scientific. What was the reason which prevented them from coming to an agreement? Was it that the question was a difficult and doubtful one upon which men of science might well differ? It would seem not. It is described in the joint report as being "considerable difference of opinion on certain fundamental propositions." What it really was appears from the separate Report of the Commissioners of the United States.¹ They conceived, as is therein stated by them, that the only subject which they were to consider was the facts relating to seal life in the Bering Sea, and what measures were necessary to secure its preservation. If there were any question of property, or international right, or political expediency, involved, it was, presumably, to be determined by others. They had no qualifications for such a task, and were not called upon to perform it. But the Commissioners of Great Britain took a different view. In that view the question of the respective national rights of Great Britain and the United States was one of "fundamental importance," and no measures were entitled to consideration which denied or ignored the supposed right of subjects of Great Britain to carry on pelagic sealing. Their understanding of the question upon which they were to give an opinion was not simply what measures were necessary to preserve the seals from extermination but what were the measures most effective to that end which could be devised *consistently with a supposed right on the part of nations generally to carry on pelagic sealing*. It is not surprising that no agreement could be reached. There was a radical difference of opinion between the Commissioners in respect to their functions. According to the views of the United States Commissioners, a question mainly scientific was submitted to them; but their associates on the part of Great Britain thought that legal and political questions were also submitted, or, if not submitted, that they were bound to act upon the view that the range of their scientific inquiry was bounded and limited by assumptions which they were required to make respecting international rights; in other words, their functions were not those of scientific seekers for the truth, but diplomatic agents, intrusted with national interests, and charged with the duty of making the best agreement they could consistently with those interests.

¹ *Ibid.*, pp. 316-318.

It seems very clear that this conception of their powers and functions was wholly erroneous. There were differences between Great Britain and the United States respecting the subject of pelagic seal hunting; but both nations were agreed that it was extremely desirable that the capture of seals should be so regulated, if possible, as to prevent the extermination of the species. It was extremely desirable to both parties to know one thing, and that was, whether any, and if any, what measures were *necessary* in order to prevent this threatened extermination. This was a mainly scientific question; but whether the measures which might be found to be thus necessary could be acceded to by both parties to the controversy was quite another question, the decision of which was lodged with the political representatives of the respective governments. If they should be prepared to accede to them, all difficulty would be removed. If they should not be able to agree, a tribunal was provided with power to determine what should be done, and the reports of the Commissioners were to be laid before it for its instruction.

Such being the view which the Commissioners of Great Britain took of their own functions, their report should be regarded as partaking of the same character, and such it appears to be upon inspection. There is in no part of it any purpose discernible to discover and reveal the true cause which is operating to diminish the numbers of the fur-seal, and to indicate the remedy, if any, which science points out. It is apparent throughout the report that its authors conceived themselves to be *charged with the defense* of the Canadian interest in pelagic sealing; and it consequently openly exhibits the character of a labored apology for that interest, particularly designed to minimize its destructive tendency, and to support a claim for its continued prosecution. This being its distinguishing feature, it is, with great respect, submitted that any weight to be allowed to it as evidence should be confined to the *statements of facts* which fell under the observation of its authors; that these should be regarded as the utterances of unimpeachable witnesses of the highest character, testifying, however, under a strong bias; and that the opinions and reasonings set forth in it should be treated with the attention which is usually accorded to the arguments of counsel, but as having no value whatever as *evidence*.

In thus pointing out the general character of the Report of the Commissioners of Great Britain, no reflection is intended upon its authors. Similar observations would be applicable to the Report of the United

States Commissioners had they taken the same view of their functions. Their conception, however, of the duties imposed upon them was widely different. They regarded themselves as called upon simply to ascertain the truth, whatever it might be, concerning "seal life in Behring Sea and the measures necessary for its proper protection and preservation." This seemed to them essentially a scientific inquiry, and not to embrace any consideration of national rights, or of the freedom of the seas—a class of questions which they would probably have deemed themselves ill qualified to solve. They are not, indeed, to be presumed to be less interested in behalf of their own nation than their associates on the side of Great Britain; but as they did not conceive themselves charged with the duty of protecting a supposed national interest, they could remember that science has no native country, and that they could not defend themselves, either in their own eyes, or before their fellows of the scientific world, if they had allowed the temptations of patriotism to swerve them from the interests of truth. Their report is earnestly recommended to the attention of the Tribunal as containing a statement of all the material facts relating to seal life, uncolored by national interest, and clearly presenting the scientific conclusions which those facts compel.

From the evidence classified as above, which may be regarded as being before the Tribunal, we now proceed to collect the principal facts relating to seal life, and the methods by which the animal is pursued and captured, so far as those facts are material in the inquiry whether the United States have the property interest asserted by them. For the principal facts of seal life we borrow the statement contained in the report of the United States Commissioners.

PRINCIPAL FACTS IN THE LIFE HISTORY OF THE FUR-SEAL.

1. The Northern fur-seal (*Callorhinus ursinus*) is an inhabitant of Bering Sea and the Sea of Okhotsk, where it breeds on rocky islands. Only four breeding colonies are known, namely, (1) on the Pribilof Islands, belonging to the United States; (2) on the Commander Islands, belonging to Russia; (3) on Robben Reef, belonging to Russia; and (4) on the Kurile Islands, belonging to Japan. The Pribilof and Commander Islands are in Bering Sea; Robben Reef is in the Sea of Okhotsk, near the island of Saghalien, and the Kurile Islands are between Yezo and Kamchatka. The species is not known to breed in any other part of the world. The fur-seals of Lobos Island and the south seas, and also those of the Galapagos Islands and the islands off lower California, belong to widely-different species, and are placed in different genera from the Northern fur-seal.

2. In winter the fur-seals migrate into the North Pacific Ocean. The herds from the Commander Islands, Robben Reef, and the Kurile Islands move south along the Japan coast, while the herd belonging to

the Pribilof Islands leaves Bering Sea by the eastern passes of the Aleutian chain.

3. The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year. In summer the two herds remain entirely distinct, separated by a water interval of several hundred miles; and in their winter migrations those from the Pribilof Islands follow the American coast in a southeasterly direction, while those from the Commander and Kurile Islands follow the Siberian and Japan coasts in a southwesterly direction, the two herds being separated in winter by a water interval of several thousand miles.

This regularity in the movements of the different herds is in obedience to the well-known law that *migratory animals follow definite routes in migration, and return year after year to the same places to breed*. Were it not for this law, there would be no such thing as stability of species, for interbreeding and existence under diverse physiographic conditions would destroy all specific characters.¹

The pelage of the Pribilof fur-seals differs so markedly from that of the Commander Islands fur-seals that the two are readily distinguished by experts, and have very different values, the former commanding much higher prices than the latter at the regular London sales.

4. The old breeding males of the Pribilof herd are not known to range much south of the Aleutian Islands, but the females and young appear along the American coast as far south as northern California. Returning, the herds of females move northward along the coasts of Oregon, Washington, and British Columbia in January, February, and March, occurring at varying distances from shore. Following the Alaska coast northward and westward, they leave the North Pacific Ocean in June, traverse the eastern passes in the Aleutian chain, and proceed at once to the Pribilof Islands.

5. The old (breeding) males reach the islands much earlier, the first coming the last week in April or early in May. They at once land and take stands on the rookeries, where they await the arrival of the females. Each male (called a bull) selects a large rock, on or near which he remains until August, unless driven off by stronger bulls, never leaving for a single instant, night or day, and taking neither food nor water. Both before and for sometime after the arrival of the females (called cows) the bulls fight savagely among themselves for positions on the rookeries and for possession of the cows, and many are severely wounded. All the bulls are located by June 20.

6. The bachelor seals (holluschickie) begin to arrive early in May, and large numbers are on the hauling grounds by the end of May or first week of June. They begin to leave the islands in November, but many remain into December or January, and sometimes into February.

7. The cows begin arriving early in June, and soon appear in large schools or droves, immense numbers taking their places on the rookeries each day between the middle and end of the month, the precise dates varying with the weather. They assemble about the old bulls in compact groups, called harems. The harems are complete early in July,

¹ The home of a species is the area over which it breeds. It is well known to naturalists that migratory animals, whether mammals, birds, fishes, or members of other groups, leave their homes for a part of the year because the climatic conditions or the food supply become unsuited to their needs; and that wherever the home of a species is so situated as to provide a suitable climate and food supply throughout the year, such species do not migrate. This is the explanation of the fact that the northern fur-seals are migrants, while the fur-seals of tropical and warm temperate latitudes do not migrate.

at which time the breeding rookeries attain their maximum size and compactness.

8. The cows give birth to their young soon after taking their places on the harems, in the latter part of June and in July, but a few are delayed until August. The period of gestation is between eleven and twelve months.

9. A single young is born in each instance. The young at birth are about equally divided as to sex.

10. The act of nursing is performed on land, never in the water. It is necessary, therefore, for the cows to remain at the islands until the young are weaned, which is not until they are four or five months old. Each mother knows her own pup, and will not permit any other to nurse. This is the reason so many thousand pups starve to death on the rookeries when their mothers are killed at sea. We have repeatedly seen nursing cows come out of the water and search for their young, often traveling considerable distances and visiting group after group of pups before finding their own. On reaching an assemblage of pups, some of which are awake and others asleep, she rapidly moves about among them, sniffing at each, and then gallops off to the next. Those that are awake advance toward her, with the evident purpose of nursing, but she repels them with a snarl and passes on. When she finds her own, she fondles it a moment, turns partly over on her side so as to present her nipples, and it promptly begins to suck. In one instance we saw a mother carry her pup back a distance of fifteen meters (50 feet) before allowing it to nurse. It is said that the cows sometimes recognize their young by their cry, a sort of bleat.

11. Soon after birth the pups move away from the harems and huddle together in small groups, called "pods," along the borders of the breeding rookeries and at some distance from the water. The small groups gradually unite to form larger groups, which move slowly down to the water's edge. When six or eight weeks old the pups begin to learn to swim. Not only are the young not born at sea, but if soon after birth they are washed into the sea they are drowned.

12. The fur-seal is polygamous, and the male is at least five times as large as the female. As a rule each male serves about fifteen or twenty females, but in some cases as many as fifty or more.

13. The act of copulation takes place on land, and lasts from five to ten minutes. Most of the cows are served by the middle of July, or soon after the birth of their pups. They then take the water, and come and go for food while nursing.

14. Many young bulls succeed in securing a few cows behind or away from the breeding harems, particularly late in the season (after the middle of July, at which time the regular harems begin to break up). It is almost certain that many, if not most, of the young cows are served for the first time by these young bulls, either on the hauling grounds or along the water front.

These bulls may be distinguished at a glance from those on the regular harems by the circumstance that they are fat and in excellent condition, while those that have fasted for three months on the breeding rookeries are much emaciated and exhausted. The young bulls, even when they have succeeded in capturing a number of cows, can be driven from their stands with little difficulty, while (as is well known) the old bulls on the harems will die in their tracks rather than leave.

15. The cows are believed to take the bull first when two years old, and deliver their first pup when three years old.

16. Bulls first take stands on the breeding rookeries when six or seven

years old. Before this they are not powerful enough to fight the older bulls for positions on the harems.

17. Cows, when nursing, regularly travel long distances to feed. They are frequently found 100 or 150 miles from the islands, and sometimes at greater distances.

18. The food of the fur-seal consists of fish, squids, crustaceans, and probably other forms of marine life also. (See Appendix E.)

19. The great majority of cows, pups, and such of the breeding bulls as have not already gone, leave the islands about the middle of November, the date varying considerably with the season.

20. Part of the nonbreeding male seals (holluschickie), together with a few old bulls, remain until January, and in rare instances until February, or even later.

21. The fur-seal as a species is present at the Pribilof Islands eight or nine months of the year, or from two-thirds to three fourths of the time, and in mild winters sometimes during the entire year. The breeding bulls arrive earliest and remain continuously on the islands about four months; the breeding cows remain about six months, and part of the nonbreeding male seals about eight or nine months, and sometimes throughout the entire year.

22. During the northward migration, as has been stated, the last of the body or herd of fur-seals leave the North Pacific and enter Bering Sea in the latter part of June. A few scattered individuals, however, are seen during the summer at various points along the Northwest Coast; these are probably seals that were so badly wounded by pelagic sealers that they could not travel with the rest of the herd to the Pribilof Islands. It has been alleged that young fur-seals have been found in early summer on several occasions along the coasts of British Columbia and southeastern Alaska. While no authentic case of the kind has come to our notice, it would be expected from the large number of cows that are wounded each winter and spring along these coasts and are thereby rendered unable to reach the breeding rookeries and must perforce give birth to their young—perhaps prematurely—wherever they may be at the time.

23. The reason the northern fur-seal inhabits the Pribilof Islands to the exclusion of all other islands and coasts is that it here finds the climatic and physical conditions necessary to its life wants. This species requires a uniformly low temperature and overcast sky and a foggy atmosphere to prevent the sun's rays from injuring it during the long summer season when it remains upon the rookeries. It requires also rocky beaches on which to bring forth its young. No islands to the northward or southward of the Pribilof Islands, with the possible exception of limited areas on the Aleutian chain, are known to possess the requisite combination of climate and physical conditions.

All statements to the effect that fur-seals of this species formerly bred on the coasts and islands of California and Mexico are erroneous, the seals remaining there belonging to widely different species.

In the general discussion of the question submitted to the Commission it will be convenient to consider the subject under three heads, namely:

Conditions of seal life in the region under consideration at the present time.

Causes, the operation of which lead to existing conditions.

Remedies, which if applied would result in the restoration of seal life to its normal state, and to its continued preservation in that state.

We make no apology for adopting these statements of the United States Commissioners in their own language. The facts could hardly be more precisely expressed, and it is believed that every part of the statement will be accepted by the Tribunal as true. There is, indeed, but little to be found even in the report of the Commissioners of Great Britain in the way of direct contradiction. In order, however, that the Arbitrators may be facilitated in the verification of any facts as to which they may be in doubt, a brief discussion of the facts as to which any question has been made in the Report of the British Commissioners will be found in Part Sixth of this Argument (pp. 228-313).

There are certain material propositions of fact which are not wholly embraced in the above abovequoted extract from the Report of the Commissioners of the United States, although they are substantially contained therein, which deserve formal and separate statement.

First. In addition to the climatic and physical conditions above enumerated as necessary to render any place suitable for a breeding ground for the seals, exemption from hostile attack or molestation by man, or other terrestrial enemies, should be included. The defenceless condition of these animals upon the land renders this security indispensable. If no terrestrial spot could be found possessing the favorable climatic and physical requirements above mentioned, and which was not at the same time exempt from the unregulated and indiscriminate hostility of man, the race would speedily pass away.

Second. The mere presence of man upon the breeding places does not repel the seals, nor operate unfavorably upon the work of reproduction. On the contrary, presence and the protection which he alone is capable of affording, by keeping off marauders, are absolutely necessary to the preservation of the species in any considerable numbers.

Third. If man invites the seals to come upon their chosen resorts, abstains from slaughtering them as they arrive, and cherishes the breeding animals during their sojourn, they will as confidently submit themselves to his power as domestic animals are wont to do. It then becomes entirely practicable to select and separate from the herd for slaughter such a number of nonbreeding animals as may be safely taken without encroaching upon the permanent stock.

Fourth. If the herd were exempt from any depredation by man, its numbers would reach a point of equilibrium at which the deficiency of food, or other permanent conditions, would prevent a further increase. At this point, the animal being of a *polygamous* nature, an annual draft from nonbreeding males might be made by man of 100,000—perhaps a larger number—without causing any appreciable permanent diminution of the herd.

Fifth. Omitting from view, as being inconsiderable, such killing of seals as is carried on by Indians in small boats from the shore, there are two forms of capture at present pursued: That carried on under the authority of the United States upon the Pribilof Islands, and that carried on at sea by vessels with boats and other appliances.

Sixth. The killing at the Pribilof Islands if confined, as is entirely practicable, to a properly restricted number of non-breeding males, and if pelagic sealing is prohibited, does not involve any danger of the extermination of the herd, or of appreciable diminution in its normal numbers. It is far less expensive than any other mode of slaughter, and furnishes the skins to the markets of the world in the best condition. The killing at these islands, since the occupation by the United States, has been restricted in the manner above indicated. It has been the constant endeavor of the United States to carefully cherish the seals and to make no draft except from the normal and regular increase of the herd. If there has at any time been any failure in carrying out such intention, it has been from some failure to carry out instructions, or want of knowledge respecting the condition of the herd. The United States are under the unopposed influence of the strongest motive, that of self-interest, to so deal with the herd as to maintain its numbers at the highest possible point. The annual draft made at the islands since the occupation of the United States has been until a recent period about 100,000. This draft would be in no way excessive were it the only one made upon the herd by man.

Seventh. Pelagic sealing has three inseparable incidents:

(1) The killing can not be confined to males; and such are the greater facilities for taking females that they comprise three-fourths of the whole catch.

(2) Many seals are killed, or fatally wounded, which are not recovered. At least one-fourth as many as are recovered are thus lost.

(3) A large proportion of the females killed are either heavy with young, or have nursing pups on the shore. The evidence upon these points is fully discussed in Appendix.

Eighth. Pelagic sealing is, therefore, by its nature, destructive of the *stock*. It can not be carried on at all without encroaching *pro tanto* upon the normal numbers of the herd, and, if prosecuted to any considerable extent, will lead to such an extermination as will render the seal no longer a source of utility to man.

Returning to the main proposition hereinbefore established, that some legal and determinate owner must be assigned to all tangible things which are (1) objects of desire, and (2) limited in supply, and (3) capable of ownership, the question is, do the Alaskan fur-seals exhibit these three essential conditions of property? Respecting the first two, no discussion is needed. That this animal is in the highest degree useful to man, and an object of eager human desire, is not questioned, and this earnest controversy is abundant proof of it. That the supply is limited and in danger of being cut off by the depredations of man is agreed to by the parties.¹ Whatever difference there may be, must and does arise upon the question whether the animal is *susceptible of ownership*. Doubt and difference are indeed possible here, and the first step in the effort to remove them should be to have a clear understanding of the meaning of the term, *susceptibility of ownership*. The definition which would naturally be first given is susceptibility of appropriation by the owner to his own use to the exclusion of all others. But this does not render the whole language entirely intelligible. We still need to know how it is possible for man to *make* this sort of exclusive appropriation to himself. What are the *acts* which are sufficient to constitute it? Must the thing, in order to be thus appropriated, be actually *in manu*, or otherwise physically attached to the person of the owner, or even within his immediate reach and sight, so that he can immediately assert his appropriation and forbid all intrusion upon it?

It is here that the conception of *ownership*, as distinct from mere *possession*, comes into view, and, inasmuch as it has a close bearing

¹ Joint Report, Case of the United States, p. 309.

upon the subject of our discussion, it should receive corresponding attention. In the rude ages of society there was but little occasion to assert a right of property beyond the few necessary things which life required, and these were mostly held in immediate possession, which could be defended by individual power. Clothing was upon the person, and the weapons for the chase, and the few agricultural implements were within immediate reach. The stock of cattle and any surplus stores of food were the property of the community or tribe. But, upon the change to private property, individuals, in pursuance of natural desires, would seek to provide themselves with increased abundance of cattle and agricultural products as stores for the future. In this and manifold other ways there arose a need for protection to these accumulations when beyond the immediate possession of the producer. If they were taken by another, the attempt would be made to regain them by force; and the disposition to produce and save would be discouraged by the difficulty and danger. The same necessities out of which property arose, namely, the peace and order of society and its advancement, forced a development in the conception, and gave birth to the idea of *ownership* as distinct from and independent of actual *possession*. Society came to the aid of individual power, and undertook to guaranty to the individual the peaceful enjoyment of what he had produced by stamping upon it his personality.

We thus perceive that the idea of *ownership* as distinct from *possession* is not an original conception. It is the product of an evolution in thought, which has accompanied the progress of man. An able English writer, in the course of an interesting sketch of the successive stages of this development observes:

The fact or institution of ownership is such an indispensable condition to any material or social progress that, even throughout the period during which the attention of law is concentrated upon family and village ownership, the ownership on the part of individual persons, of those things which are needed for the sustenance of physical life, becomes increasingly recognized as a possibility or necessity. One of the most important steps out of savagery into civilization is marked by the fact that the security of tenure depends upon some further condition than the mere circumstance of possession.

The use of the products of the earth, and still more, the manufacture of them into novel substances, consists, generally, of continuous processes extending over a length of time during which the watchful attention of the worker can only be intermittently fixed upon all the several points and stages. The methods of agriculture and grazing, as well as the simplest applications of the principle of division of labor, similarly presuppose the repeated absence of the farmer or mechanic from one part of his work, while he is bestowing undistracted toil upon

another part; or else entire absorption in one class of work, coupled with a steady reliance that another class of work, of equal importance to himself, is the object of corresponding exertion on the part of others.

In all these cases the mere fact of physical holding or *possession*, in the narrowest sense, is no test whatever of the interests or claims of persons in the things by which they are surrounded.¹

¹The Science of the Law, by Sheldon Amos, Lond., 1881, pp. 148, *et seq.* A distinguished French jurist thus traces the development of the conception of *ownership* as distinct from possession:

"SEC. 64. If the laws attached to property and those which are derived from it are now very extensive it was not thus originally. Property was confounded with possession and it was lost with it.

"Before the foundation of the civil state the earth was no one's; the fruits belonged to the first occupant. The men that were distributed over the globe lived in a state which the writers who have written on natural law have termed negative community, in distinction from positive community, in which several associates held in common ownership an indivisible thing belonging to each in a certain portion.

"Negative community, on the contrary, consisted in that the thing common to all did not belong more to each one of them in particular than to the other, and in that no one could prevent another from taking that which he considered proper to make use of in his needs.

"This doctrinal expression of negative community signifies nothing else but the primitive and determinate right (*droit*) that all men had originally to make use of the goods which their earth offered, as long as no one had yet taken possession of them.

"SEC. 65. It is this which is termed the right of the first occupant. He who first possesses himself of a thing acquires over it a kind of transient ownership, or, to speak more exactly, a right of preference which others should respect. They should leave that thing to him while he possesses it; but, after he had ceased to make use of it or to occupy it, another in his turn might make use of it or occupy it.

"If the older possessor had invoked his past possession as a right of preference still existing, the younger could be able to answer by his present possession; and when, furthermore, rights are equal on both sides, it is just and natural that the actual possessor should be preferred; for to take possession away from him there should be a stronger right than his own.

"Thus the right of occupation is a title of legitimate preference founded on nature.

"SEC. 66. The existence of this primitive state of negative community is incontestable; proofs of the same are found in Genesis, the most ancient of all books, and the most venerable even when considering it only from an historical point of view.* The poets, in their picturing of the Golden Age, have left us ornamented works, but inaccurate ones. The ancient historians have transmitted to us tradition; and, finally, examples thereof were found again in the habits of the savage tribes of America when that continent was discovered.

"SEC. 67. Thus, following a comparison of Cicero, the world was like a vast theater belonging to the public, and of which each seat became the property of the first occupant as long as it suited him to remain therein, but which he could not prevent another from occupying after he had left it.

"SEC. 68. But how could this preference acquired by occupation have become a stable and permanent ownership, that would continue to subsist and could be reclaimed after the first occupant had ceased to be in possession?

"It was agriculture that gave birth to the idea of and made felt its necessity for permanent property. In measure as the number of men increased, it became more

* Genesis, I, 28 and 29.

The range of thought by which the rights of ownership are limited to a clear physical possession is characteristic of the barbaric age. The first advances beyond it are promoted and accompanied by the beginnings of the conception of *ownership* as distinct from *possession*, and the full development of that conception is the condition and accompaniment of the advanced stages of civilization. Its final expression is in the main proposition which stands at the basis of our argument, and was laid down at the beginning, namely, that every useful thing the supply of which is limited should be the property of a determinate owner, provided it is susceptible of exclusive appropriation. With those things which are capable of actual possession at all times there is no difficulty. The right of property once established by possession continues, but in the case of those things not thus capable the law

difficult to find new uninhabited lands; and on the other hand continued habitation of the same place engendered a too rapid consumption of the natural fruits of the earth for them to suffice for the subsistence of all the inhabitants and of their flocks, without changing locality, or without providing therefor by cultivation in a constant and regular manner.

"Thus agriculture was the natural result of the increase of the human species; agriculture in turn favored population, and rendered necessary the establishment of permanent property. For who would give himself the trouble to labor and to sow, if he had not the certainty of reaping?

"The field that I have cleared and sown should belong to me at least until I have gathered the fruits that my labor has produced. I have the right to employ force to repulse the unjust person who would wish to dispossess me of it and to drive away him who should have seized it during my absence. I am regarded as continuing to occupy the field from the first tilth to the harvest, though, in the interval, I do not perform each moment exterior acts of occupation or of possession, because one cannot suppose that I have cleared, cultivated, and sown without intention to reap.

"SEC. 69. This habitual occupation, which results from cultivation, preserves therefore the right of preference which I had acquired by first occupation. It is this habitual occupation which civil law (*le droit civil*) extended and applied as a means of preserving possession, in establishing as a maxim that possession is preserved by sole intention, *nudo animo*.

"Cultivation forms a stronger and more lasting tie than single occupation; it gives a perfect right to the harvest. But how maintain a right (*droit*) other than by doubtful contest before the foundation of the civil state?

"SEC. 70. Moreover the right which cultivation gives and the effects of occupation which are derived therefrom cease with the harvest if there are no new acts of cultivation; for nothing would further indicate an intention to occupy. The field which would cease to be cultivated would again become vacant and subject to the right of the first occupant.

"Agriculture alone, therefore, was not sufficient to establish permanent property; and since as before the invention and the usage of agriculture, property was acquired by occupation, was preserved by continued or habitual possession, and was lost with possession. This principle is still followed in regard to things which have remained in the primitive state or negative community, such as savage animals.

"SEC. 71. In order to give to property a nature of stability which we observed in

does not lend its aid to reinforce the imperfect possession unless the great purposes of human society require it.

That it will lend its aid to the utmost extent when necessary in order to attain its own great purposes is made manifest by the tendency of the advancing civilization of the present age to award a right of property in the products of the mind, which are wholly intangible and not the subject of possession in any form, and to extend the right, not only by municipal law throughout the territories of particular states, but beyond their boundaries by the means of an international recognition. This right, fully defended by natural law, and long established in respect of useful inventions in the arts, has been for years pressing for recognition in respect to all the products of the mind and throughout the world. Its inherent moral force has secured a certain measure of obedience without the aid which is furnished by judicial tribunals, and

it to-day, positive laws and magistrates to execute them were necessary; in other words, the civil state was required.

"The increase of the human species had rendered agriculture necessary; the need to assure to the cultivator the fruits of his labor made felt the necessity of permanent property and of laws to protect them. Thus, it is to property that we owe the foundation of the civil state. Without the tie of property it would never have been possible to subject man to the salutary yoke of the law; and without permanent property the earth would have continued to remain a vast forest.

"Let us say, therefore, with the most exact writers, that if transient ownership or the right of preference with occupation gives, is anterior to the foundation of civil society, permanent ownership, as we know it to-day, is the work of civil law.

It is civil law which has established as a maxim that once acquired property is never lost without the act of the owner, and that it is preserved even after the owner has lost possession or detention of the thing, and when it is in the hands of a third party.

Thus property and possession, which in the primitive state were confounded, became by the civil law two distinct and independent things; two things which, according to the language of the laws, have nothing in common between them. Property is a right, a legal attribute; possession is a fact.

It is seen by this what prodigious changes have been wrought in property, and how much civil laws have changed its nature.

SEC. 72. This change was effected by means of real action that the laws granted against the possessor whoever he might be, to compel him to surrender the thing to the owner who had lost possession thereof. This action was granted to the owner not alone against the possessor in bad faith, but also against the possessor in good faith, to whom the thing had come without fraud or without violence, without his being cognizant of the owner's rights, and even though he had acquired it from a third party by virtue of a legal title.

SEC. 73. Property was, therefore, considered a moral quality inherent in the thing, as a real tie which binds it to the owner, and which can not be severed without an act of his.

This right of reclaiming a thing in whatever hands it is found is that which forms the principal and distinctive characteristic of property in the civil state. (Toullier French Civil Law, Paris, 1812, 5th ed., vol. 3, tit. 2, ch. 1.)

its complete establishment by the instrumentality of formal international copyright laws is impatiently awaited.

These considerations lead up to the particular problem upon which we are engaged, namely, what is *capability of ownership*, that is to say, under what circumstances, and to what extent, will and does society step in and *aid the infirmity of individual power* by stamping the character of *ownership* upon things which are out of the actual possession and away from the presence of the owner? The general answer is obvious; it will do this whenever social necessities require, and to the extent to which they require it. And this answer is best justified by pointing out what society, through the instrumentality of the law, universally does. We may first look to the instance of *land*.

In respect to the earth itself, society will recognize no title which is not directly, or indirectly, acquired from itself. No man is permitted to assert in respect to uninhabited countries, or countries inhabited only by savages, a private title. But nations may assert a title thereto, although there is a limit to such assertion. No nation can assert an ownership over such lands to an extent greater than it can reasonably occupy and improve. The limit is found in that principle of the law of nature which declares that the earth was made for mankind, and in order to enable the human race to carry out its destiny, and that to this end civilized nations may supplant barbarous ones; but that every nation in thus appropriating to itself the waste places of the earth, must not take from others what it can not itself improve and apply to the great destiny for which in the order of nature it has been given.

In respect to individual ownership of lands, the state will recognize and maintain private titles to such lands as it chooses to give. Sometimes, as we have already shown, in early and rude social conditions, it prefers to give nothing, but to retain the ownership in itself. In general, however, civilized societies permit and encourage the acquisition of lands by individuals and place no limits upon the extent of acquisition. Society acts upon the assumption, for the most part undoubtedly correct, that under individual ownership its territories will be best improved and turned to the purposes intended by nature. That the underlying motive upon which society acts is the intention that the soil should be devoted to those purposes to which the law of nature dictates that it should be applied, is well manifested by the circumstance that, where the action of the private proprietors tends to counteract this policy, the state is often moved to revoke its gifts, and make

a new disposition of its lands in harmony with natural law. This tendency is observable where great proprietors reserve large tracts of land for game preserves, for the purposes of mere pleasure, or hold them under a system of rental unfavorable to agricultural improvement, and not adapted to supply the wants of an increasing population. The recent legislation of Great Britain in respect to Ireland is a notable instance of an assertion by the State of that supreme dominion over its lands which a nation always retains, to the end that they may be made the more subservient to the purposes for which the earth was destined.

From what has just been said it is apparent that land, although no individual can actually appropriate more than a very small area to his exclusive use, is nevertheless regarded in the law as *susceptible of exclusive appropriation*. The state permits its citizens to assert title to it to an unlimited extent, and the assertion may be made without even any formal physical act of possession. No fences or inclosures even are necessary. The execution of an instrument in writing is of itself sufficient. The law steps in to aid individual power and enables a private person to hold title to a province as securely as he holds the harvests he reaps from his fields with his own hands.

And the reason is immediately obvious. It is only by the award of property that the earth will be *cultivated*. No man will sow that another may reap; but if the law will lend its aid to human power by protecting the owner of land in his exclusive enjoyment of it, he can and will draw from it by his art and industry its annual product without impairing its capacity for production, and will even increase that capacity. This is the only way in which an increased population can be supported. Social necessity, therefore, requires that land should be deemed susceptible of exclusive appropriation, and all structures affixed to the land become a part of it and are property together with it.

In respect to such *movable things* as are the fruits of the land or the products of industry, there is no limit to the assertion of ownership, and the circumstance of actual possession is absolutely immaterial. The fruits of the cultivation of the earth must, of course, be the property of the husbandman, else his title to the soil would be unavailing, and, in respect to all other products of industry, the same social necessity protects them as property. But for such protection they would not be produced, except for the personal use of the workman. The various arts may be said to be subsidiary to the better cultivation of the earth, for it is these which enable the cultivators to devote their exclusive attention to it.

All the *useful domestic animals* are held to be the subjects of exclusive appropriation, however widely they may wander from their masters. A man may assert his title to vast herds, which roam over boundless wastes, and which he may not even see for months in succession, as easily as to the cattle which are nightly driven to his home. He has no proper *possession* of them other than that which the law supplies by the title which it stamps upon them. And the obvious reason is that from their *nature and habits* he has such a *control* over them as enables him, if the law will lend him its aid, to *breed* them, in other words, to cultivate them, and furnish the annual increase for the supply of human wants, and at the same time to preserve the stock. In no other way could this be accomplished. Without the protection afforded by the safeguard of property the race of domestic animals would not have existed.

In the case of animals in *every respect wild* and yet *useful*, such as sea fishes, wild ducks, and most other species of game, we find different conditions. Here man has no control over the animals. They do not, in consequence of their nature and habits, regularly subject themselves to his power. He cannot determine, in any case, what the annual increase is. He cannot *separate* the superfluous increase from the breeding stock, and confine his drafts to the former, leaving the latter untouched. For the most part these animals are not *polygamous*, but *mate* with each other, and no part of their numbers are *superfluous* rather than another. All drafts made upon them are equally destructive; for all must be taken from breeding animals. No selections for slaughter can be made. In short, man can not, by the practice of art and industry, *breed* them. They can not be made the subjects of *husbandry*. And yet man must be permitted to take them for use, or be wholly deprived of any benefit from them. No award of a property interest in them to any man or set of men would have any effect in enabling the annual increase to be applied to satisfy human wants and at the same time to preserve the stock. The law could not give to individual men that control over them which their nature and habits deny; and the law never makes the attempt. The fish of the sea and most of the fowls of the air are, and must forever remain, in every sense wild. They are not, therefore, the subjects of property.

And here nature, as if conscious of the inability of man to furnish that protection to these wild races against destructive pursuit which the institution of property affords in the case of domestic animals, her-

self makes provision for the purpose. In limiting within narrow bounds his *control* over them, she correspondingly limits his power of destruction. She confers upon these races the means of eluding capture. And, besides this, in the case of wild animals most largely useful, she makes destruction practically impossible by furnishing a prodigious supply. The great families of useful fishes are practically inexhaustible. This is, however, much less so in some cases than in others. In respect of many species of fishes, game birds, and other animals, the human pursuit is so eager as to endanger the existence of the species; and in such instances, society, unable by the award of a property interest to arrest the destruction, resorts to the most effective devices which are in its power to secure that end. It confines and limits the destruction to certain seasons and places by positive enactments of which game laws are the type.

We now come to those animals which lie near the vague and indefinite boundary which separates the *wild* from the *tame*, to animals which exhibit some of the qualities of each class; and we shall instance those already made the subject of discussion when confining our inquiry to the settled doctrines of the municipal law. These instances were those of *bees, deer, pigeons, wild geese, and swans*. All these, it will be remembered, are regarded in that law as subjects of property so long as they possess the *animus revertendi*, evidenced by their usual habit of returning to a particular place. These animals differ widely from each other in their nature; but they have certain characteristics which are common to all. Each of them, habitually and voluntarily, so far subjects itself to the control of man as to enable him, by the practice of art and industry, to take the annual increase for the supply of human wants without diminishing the stock; in other words, to *breed them*, and to make them the subject of *husbandry*; and, in the case of each, unless a property interest were awarded by the law, that is to say, unless the law came to the aid of human infirmity, and declared them to be *susceptible of ownership*, notwithstanding the want of actual possession, they would cease to exist and be lost to the world.

The case of *bees* is an instructive illustration. They are by nature wild. They can not be tamed so as to be made obedient to man. They move freely through the air and gather their honey from flowers in all places. But they have an instinct which moves them to adopt a suitable place for a home, and man may avail himself of this to induce them to take up their abode upon his property, where he can protect them

from other enemies and take from them a part of their accumulated stores. He is thus also enabled to capture the new swarms which are produced, by following them as they take their flight. In this way the art and industry of man may increase the stock of bees and the useful food which they supply. The municipal laws of all nations therefore declare that bees thus dealt with are property. Any one who destroys them, even when away from the land of the owner, commits a wrong for which the laws will afford full redress; and the right of property remains even in respect to a swarm which takes its flight beyond the boundaries of the owner, so long as he can identify and pursue it. It would be manifestly impossible to protect that right any further. There is no change effected in the nature of the bees by this action of man. They are as wild as their fellows which have their homes in the forest. Man simply avails himself of their natural instinct to accept a suitable place for their home and storehouse.

A similar instinct is possessed by *pigeons* which leads them and their offspring to take up their abodes in places prepared for them by man. They may be first wonted to it by confinement, or attracted by feeding; but when they have adopted it, if protected against enemies and cherished with care, their number may be greatly multiplied, and by judicious drafts upon the increase a delicate food may be procured in considerable quantities. There is in the case of these animals a difficulty in securing to individual owners all the remedial rights which protect property arising out of the tendency of flocks to commingle, and the impossibility of identification. But, in spite of this, in the opinion of many jurists, they are to be deemed property. The obvious ground is the social benefit which may be secured by offering to this art and industry its natural reward, and thus encourage the practice of it. Without such encouragement society would lose the benefit it receives from this animal.

There is a like opportunity to take advantage of the instincts of wild animals, and thus gain over them a power which makes them subservient to the wants of man in the case of *wild geese and swans*. These also may be made wonted to a particular place, from which they will widely wander over waters belonging to different owners, or to the state, but to which they will habitually return, and where they will rear their young. They thus submit themselves voluntarily to the power of man, and afford him a control over them which enables him at once to preserve the stock and take the increase. On these grounds a right of

property in them is conceded to the owner of the spot which they make their home, which is not lost by the temporary departures therefrom. Any killing or capture of these animals by another, having notice of their habits, is a violation of property rights for which the law furnishes redress.

So also in the case of deer ordinarily kept in an inclosure, and fed, and from which selections are made for slaughter. The habit of returning is here only imperfectly established. The animals are apt to resume their wild nature; but nevertheless, the economic uses they subserve are sufficient to sustain a property interest in them, inasmuch as they are thus made, to borrow the language employed in relation to them by the English Court of Common Pleas, "as much a sort of husbandry as horses, cows, sheep, or any other cattle."¹

It is observable that these doctrines relating to property so familiar in the municipal jurisprudence of civilized nations, relating to the several descriptions of animals above mentioned, have not had their origin in special legislation, but in the unwritten law. They are the fruit of the unconscious action of society manifesting itself in the formation of usages which eventually compel the recognition of law. This means that they have their origin in natural law which is the basis of all unwritten jurisprudence. They are the dictates of universal morality, cultivated, ascertained, and formulated by judicial action through long periods of time. It is this which stamps them with that character of approved, long established and unchangeable truth which makes them binding upon an international forum as being the indubitable voice of natural and universal law.

The inquiry which has thus been prosecuted into the grounds and reasons upon which the institution of property stands fully substantiates, it is believed, the main proposition with which it began, namely, *that where any useful animals so far subject themselves to the control of particular men as to enable them exclusively to cultivate such animals and obtain the annual increase for the supply of human wants, and at the same time to preserve the stock, they have a property interest in them.* And this conclusion, deducible from the broad and general doctrines of the law of nature, is confirmed by the actual fact as exhibited in the usages and laws of all civilized states. Wherever a useful animal exhibits in its nature and habits this quality, it must be denominated and treated as the subject of property, and as well between nations as between

¹ Davies v. Powell, Willes, 46.

individual men. This is the real ground upon which the municipal law declares the several descriptions of wild animals, above particularly adverted to, to be property. This is what is intended by making the question of property depend upon the existence of the *animus revertendi*.

In the added light thrown by this inquiry into the foundations of the institution of property the case of the fur-seal can be no longer open to doubt, if it ever was. It is a typical instance. Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenceless against attack, it seems almost to implore the protection of man, and to offer to him as a reward that superfluity of increase which is not needed for the continuance of the race. Its own habits go very far to effect a separation of this superfluity, leaving little to be done by man to make it complete. The selections for slaughter are easily made without disturbance or injury to the herd. The return of the herd to the same spot to submit to renewed drafts is assured by the most imperious instincts and necessities of the animal's nature. During the entire period of all absences the *animus revertendi* is ever present. The conditions are, as observed by the eminent naturalist, Prof. Huxley, *ideal*.¹ All that is needed to make the full extent of the blessing to mankind available is the exercise on the one hand of care, self-denial, and industry on the part of man at the breeding places, and, on the other, exemption from the destructive pursuit at sea. The first requisite is supplied. A rich reward is offered for, and will certainly assure, the exercise of art and industry upon the land. All that is demanded from the law is that exemption from destructive pursuit on the sea which the award of a property interest will insure.

Nor should we omit to call attention to an aspect of the question presented by the extent of the possession and control of, and over, this race of animals bestowed upon the United States in virtue of their ownership of the lands to which it resorts. This ownership carries with it the *power to destroy* the race almost at a single stroke. It carries with it also, if interference by other nations is withheld, the power to forever preserve. The power to destroy is shared by other nations. The power to use, and at the same time to preserve, belongs to the United States alone. This power carries with it the highest obligation to use it for the purpose for which it was bestowed. It is in the highest and truest sense a trust for the benefit of mankind. The United States

¹ Case of the United States, Appendix, Vol. I, p. 412.

acknowledge the trust and have hitherto discharged it. Can anything be clearer as a moral, and under natural laws, a legal obligation than the duty of other nations to refrain from any action which will prevent or impede the performance of that trust? The only office which belongs to other nations is to see that this trust is duly performed. In this the whole world has a direct interest. However much interference by one nation in the affairs and conduct of another may be deprecated, it is not to be denied that exigencies may arise, as they have arisen, in which such interference may be defended.¹

¹ We have habitually referred to *art*, *industry*, and *self-denial* on the part of man successfully practiced for the purpose of *increasing* the annual product of the earth as being the main foundation upon which society awards a property interest. The exercise of these qualities is enjoined by natural law, and nature always assigns to an observance of her dictates its appropriate reward. That *art* and *industry* should be thus rewarded is obvious, but the merit of *self-denial* or *abstinence*, is not so immediately plain. It will be found, however, upon reflection, to possess the same measure of desert.

In the case of the seals, for instance, the immediate temptation is to turn the whole mass to present account. Had this been done, the herds would long since have been practically exterminated. Their *present* existence is the result of a policy of denial of present enjoyment in the hope of a larger and more permanent advantage. It is quite unnecessary to enlarge upon the prodigious importance to mankind of such a policy. Indeed, without it the race could not have emerged from barbarism. The fur-seals thus preserved are as truly the fruit of human industry and effort as any of the products of the artisan.

This merit of *abstinence* is the sole foundation upon which economists and moralists place the right to *capital*, and *interest* for its use. Capital is the simply the fruit of *abstinence*. The following citations are pertinent in this place:

From N. W. Senior, Political Economy, 6th ed., London, 1872, p. 58 *et seq.*

"But although human labour and the agency of nature, independently of that of man, are the primary productive powers, they require the concurrence of a third productive principle to give them complete efficiency. The most laborious population inhabiting the most fertile territory, if they devoted all their labour to the production of immediate results and consumed its produce as it arose, would soon find their utmost exertions insufficient to produce even the mere necessities of existence.

"To the third principle or instrument of production, without which the two others are inefficient, we shall give the name of *abstinence*, a term by which we express the conduct of a person who either abstains from the unproductive use of what he can command, or designedly prefers the production of remote to that of immediate results."

After defining capital as "an article of wealth, the result of human exertion employed in the production or distribution of wealth," he goes on to say: "It is evident that capital thus defined is not a simple productive instrument. It is in most cases the result of all the three productive instruments combined. Some natural agent must have afforded the material; some delay of enjoyment must in general have reserved it from unproductive use, and some labour must in general have been employed to prepare and preserve it. By the word *abstinence* we wish to express that agent, distinct from labour and the agency of nature, the concurrence of which is necessary to the existence of capital and which stands in the same relation to profit as labour does to wages. We are aware that we employ the word *abstinence* in a more exten-

It seems impossible to imagine any ground upon which this demand can be resisted, and even difficult to understand how a question could have been made rejecting it. If there were even the semblance of a *moral* reason upon which opposition could be rested, there might be room for hesitation and debate; if anything in the nature of a *right* to

sive sense than is warranted by common usage. Attention is usually drawn to abstinence only when it is not united with labour. It is recognized instantly in the conduct of a man who allows a tree or a domestic animal to attain its full growth, but it is less obvious when he plants the sapling or sows the seed corn. The observer's attention is occupied by the labour, and he omits to consider the additional sacrifice made when labour is undergone for a distant object. This additional sacrifice we comprehend under the term abstinence. * * * of all the means by which man can be raised in the scale of being, abstinence, as it is perhaps the most effective, is the slowest in increase, and the latest generally diffused. Among nations those that are the least civilized, and among the different classes of the same nation those which are the worst educated, are almost the most improvident and consequently the least abstinent."

(At page 69): "The savage seldom employs, in making his bows or his dart, time which he could devote to the obtaining of any object of immediate enjoyment. He exercises, therefore, labour and providence, but not abstinence. The first step in improvement, the rise from the hunting and fishing to the pastoral state, implies an exercise of abstinence. Much more abstinence, or, in other words, greater use of capital, is required for the transition from the pastoral to the agricultural state; and an amount not only still greater, but constantly increasing, is necessary to the prosperity of manufactures and commerce."

From "*Essai sur la Répartition des Richesses*," par Paul Leroy-Beaulieu, 2d ed. Paris, 1883:

"The first cause of interest is the service rendered to the borrower, the increase of productivity given to his labor, industry, commerce. The second cause of interest is the pains taken by the lender, the sacrifice necessary for abstinence in depriving himself of immediate consumption for a delayed profit."

From "*American Political Economy*." Francis Bowen, p. 204, ch. XI:

"Capital being amassed as we have seen by frugality or abstinence, profits are the reward of abstinence just as wages are the remuneration of labor, and rent is the compensation for the use of land."

From "*Some leading Principles of Political Economy Newly Expounded*." By J. E. Cairnes, New York, 1874, p. 80:

"The term abstinence is the name given to the sacrifice involved in the advance of capital. As to the nature of the sacrifice it is mainly of a negative kind, consisting chiefly in deprivation and postponement of enjoyment implied in the fact of parting with our wealth, so far at least as concerns our present power of commanding it."

From "*Principles of Economics*." Alfred Marshall, professor in the University of Cambridge, London, 1870. Vol. 1, bk. VII, ch. VII, sec. 2, p. 612:

"A man who, working on his own account, makes a thing for himself has the use of it as the reward for his labour. The amount of his work may be determined in a great measure by custom or habit, but in so far as his action is deliberate he will cease his work when the gains of further work do not seem to him worth the trouble of getting them. But the awakening of a new desire will induce him to work on further. He may take out the fruits of this extra work in immedi-

capture seals at sea could be pretended, it would be necessary to pause and deliberate. It may indeed be said that there is no *power* in the United States to prevent sealing upon the high seas; but this is a begging of the question. If they have a property interest in the seals, the power to protect it can not be wanting. But let this question go

ate and passing enjoyment, or in lasting but distant benefits, * * * or in imple-
ments which will aid him in his work, * * * or, lastly, in things which he can
let out on hire or so invest as to derive an income from them. Man's nature, how-
ever, being impatient of delay, he will not, *as a rule*, select any of the three latter
methods unless the total benefit which he expects in the long run seems, after allow-
ing for all risks, to show a surplus over its benefits to be derived by taking out the
fruits of his labor in immediate enjoyment. That surplus, whether it take the form
of interest on capital, or extra pleasure derived from the direct useance of permanent
forms of wealth, is the reward of his postponing or waiting for the fruits of his
labour."

From the *Ethics of Usury and Interest*. By W. Blissard, M. A., London, 1892, p.
26 *et seq.*:

"On the hypothesis that all have equal opportunities of social progress, the social
destroyers of its wealth deserve condemnation, while those who have served the
cause of progress by saving from personal consumption a part of the earth's produce
and devoting it to the improvement of national mechanism have a claim to a reward
proportioned to their service and to the efforts which they have made in rendering
it. These are the conditions of advance in civilization in the arts, and sciences, in
literature, and religion. For the command over nature differentiates the civilized
man from the savage. * * * It appears, hence, how accurate is the common
phrase which calls thrift 'saving.' Economists favor such other words as 'absti-
nence,' deferred 'enjoyment,' and the like; but to 'save' expresses the primary idea
that something has been saved from the destruction to which mere animal instinct
would devote it. In such salvage lies the progress of the human species from sav-
agery to godhead. By how much has been thus saved has the salvation, material,
mental, and moral, of the race been achieved."

From "Political Economy." By Francis A. Walker. New York, 1883. Page 67,
sec. 78;

"*The Law of Capital*.—It is not necessary to trace further the increase of capital.
At every step of its progress capital follows one law; it arises solely out of saving;
it stands always for self-denial and abstinence."

(Page 232): "Capital is, as we have seen, the result of saving. Interest, then, is
the reward of abstinence. A part, a large part, of all produced wealth must be at
once consumed to meet the conditions of human existence; but the remaining portion
may be consumed or may be accumulated, according to the will of the owner. The
strength of the motive to accumulation will vary with the reward of abstinence.
If that be high the disposition to save will be strengthened, and capital will be
rapidly accumulated; if that be low, that disposition will be relatively weak, and
capital will increase slowly, if indeed the body of existing capital be not dissipated
at the demands of appetite."

From "Chapters on Practical Political Economy." Prof. Bonamy Price. 2d ed.
London, 1882. Pages 127, 128:

Speaking of *Profit* he says: "What is the nature, the principle of this gain? It is
a reward for two things, for the creation and employment of capital. Economists
have rightly explained the need and justification for such a reward for the creation
of capital, that it is a compensation for abstinence. The owner of the wealth

for the present; it will be elsewhere discussed. Let it be conceded, for the sake of argument, that the United States have no power to protect and punish, will it be asserted before this Tribunal, bound to declare and administer the law of nature and nations—a system of *morality*—that this constitutes a *right*? What is it precisely which

might have devoted it to his own enjoyment; he preferred to save it or turn it into an instrument for creating fresh wealth. It was his own voluntary act, he gave up some luxury, he finds atonement in improved income from increased wealth. His aim was profit, but profit, though it enriched him, was no selfish course; luxurious expenditure would have been the real selfishness. By going in for profit he benefits society. His savings are an advantage to others as well as to himself. * * * Profit is the last thing which should be grudged, for profit is the creator of capital, and capital is the life blood of civilization and commercial progress.”

From “Manual of Political Economy.” Henry Fawcett. London, 1877. Bk. II, ch. v, p. 157:

“As capital is the result of saving, the owner of capital exercises forbearance when he saves his wealth instead of spending it. Profits therefore are the reward of abstinence in the same manner that wages are the reward of physical exertion.”

From “The Science of Wealth.” Amasa Walker. Boston, 1877. Ch. VI, p. 288:

“Interest has its justification in the right of property. If a man can claim the ownership of any kind of wealth, he is the owner of all it fairly produces * * * whoever by labour produces wealth and by self-denial preserves it should be allowed all the benefit that wealth can render in future production.”

From “Introduction to Political Economy.” A. L. Perry. New York, 1877. P. 115.

“The origin of all capital is in abstinence, and the reward of this abstinence is profit.”

From “A System of Political Economy.” J. L. Shadwell. London, 1877. P. 159.

“They (capitalists) desire to obtain it (profit) because the saving of capital implies the exercise of abstinence, as the capitalists might have exchanged it for other things for their own immediate consumption; but if they forego their enjoyment in order to produce commodities they require some compensation for the sacrifice to which they submit.”

From John Stuart Mill. “Principles of Political Economy.” Boston, 1848. Vol. II, p. 484:

“As the wages of the laborer are the remuneration of labor, so the profits of the capitalist are properly the remuneration of abstinence. They are what he gains by forbearing to consume his capital for his own uses and allowing it to be consumed by productive laborers for their uses; for this forbearance he requires a recompense.”

And again, at page 553: “Capital * * * being the result of abstinence, the produce of its value must be sufficient to remunerate not only all the labor required but the abstinence of all the persons by whom the remuneration of the different classes of laborers was advanced. The return for abstinence is profit.”

From “Manuel d'Economie Politique.” Par M. H. Baudrillard. 4th ed. Paris, 1878. P. 382:

“The first element of interest is the privation to which the lender subjects himself, who surrenders his capital for the benefit of another.”

(*Id.*, p. 52): “Based upon right, ownership is not less justified by the strongest reasons derived from social utility. It is useful for the laborer who has fertilized

would thus be set up as a right? It is simply and without qualification a right to *destroy* one of the gifts of nature to man. It would be saying, not to the United States alone, but to the whole world, "You shall no longer have this blessing which was originally bestowed upon you—this opportunity which nature affords to secure the preservation of the source of a blessing and make it permanently available shall not be improved; and if you ask us for a reason we give you none, except that we so choose, and can, for a few years at least, make a profit to ourselves by carrying on the work of destruction; the sea is free."

Ahrens¹ states: The definitions of the right of property given by positive laws generally concede to the owner the power to dispose of his object in an almost absolute manner, to use and abuse it, and even through caprice to destroy it;² but this arbitrary power is not in keeping with natural law, and positive legislation, obedient to the voice of common sense and reason in the interest of society, has been obliged itself to establish numerous restrictions, which, examined from a philosophic view of law, are the result of rational principles to which the right of property and its exercise are subjected.

The principles which govern socially the right of property relate to substance and to form.

I. As to substance, the following rules may be established:

1. *Property exists for a rational purpose and for a rational use*; it is destined to satisfy the various needs of human life; consequently, *all arbitrary abuse, all arbitrary destruction, are contrary to right (droit) and should be prohibited by law (loi)*. But to avoid giving a false extension to this principle, it is important to recall to mind that, according to personal rights, that which is committed within the sphere of

the soil to retain the soil itself as well as the surface. Otherwise he will use the soil as a possessor who is in haste to enjoy it. Where a thought of the future is wanting there will be no real improvement, no numerous and well-supported population, no civilization with deep roots either moral or material."

* * * "All these advantages can be the outgrowth of nothing but permanent ownership. For the same reason it is well for ownership to be individual and not collective; of this we find proof in the religious communities of the middle ages, and in our own time in the very imperfect condition of property held in common. Collective ownership is attended with this drawback, viz, that it does not sufficiently stimulate the activity of the owner."

¹ Ahrens: Course of Natural Law, Leipzig, 1876, vol. 2, book I, div. 1, sec 64.

² Roman law gave the owner the *jus utendi et abutendi*; after the Austrian code (11, 2, sec. 362), he has the power to destroy arbitrarily that which belongs to him. The Code Napoléon which defines property as "the right to enjoy and to dispose of things in the most absolute manner, provided no use be made of them forbidden by the laws or by the regulations," interposed social interest by this restriction.

private life and of that of the family does not come under the application of public law. It is necessary, therefore, that the abuse be public in order that the law may reach it. It belongs to the legislations regulating the various kinds of agricultural, industrial, and commercial property, as well as to penal legislation, to determine the abuses which it is important to protect; and, in reality legislations as well as police laws, have always specified a certain number of cases of abuses.¹ Besides, all abusive usage is hurtful to society, because it is for the public interest that the object should give the owner the advantages or the services it admits of.²

It is assumed throughout the Report of the British Commissioners that pelagic sealing is not necessarily destructive, and that, under *regulation*, the prosecution of it need not involve the extermination of the herds. This assumption and the evidence bearing upon it will be elsewhere particularly treated in what we may have to say upon the subject of regulations. It will there be shown that it is not only destructive in its *tendency*, but that, if permitted, it will complete the work of practical extermination in a very short period of time. But so far as it is asserted that a restricted and regulated pelagic sealing is consistent with the moral laws of nature and should be allowed, the argument has a bearing upon the claim of the United States of a property interest, and should be briefly considered here. Let it be clearly understood, then, just what pelagic sealing is, *however restricted or regulated*. And we shall now describe it by those features of it which are not disputed or disputable.

We pass by the shocking cruelty and inhumanity, with its sickening details of bleating and crying offspring falling upon the decks from the bellies of mothers, as they are ripped open, and of white milk flowing in streams mingled with blood. These enormities, which, if attempted within the territory of a civilized State, would speedily be

¹ On the occasion of the debate of Art. 544, which defined property, Napoleon expressed energetically the necessity of suppressing abuses. "The abuse of property," said he, "should be suppressed every time it becomes hurtful to society. Thus, it is not allowed to cut down unripe grain, to pull up famous grapevines. I would not suffer that an individual should smite with sterility 20 leagues of ground in a grain-bearing department, in order to make for himself a park thereof. The right of abuse does not extend so far as to deprive a people of its sustenance."

² Roman law says in this sense, sec 2, I, De patr. pot. 1, 8: "Expedit enim reipublicæ ne sua requis male utatur." Leibnitz further expands this principle of the Roman law by saying (De notionibus juris, etc.): "Cum nos nostraque Deo debeamus, ut reipublicæ, ita multo magis universi interest ne quis re sua male utatur."

made the subjects of criminal punishment, are not relevant, or are less relevant, in the discussion of the mere question of property.

It is not contended that in pelagic sealing (1) there can be any *selective* killing; or (2), that a great excess of females over males is not slain; or (3), that a great number of victims perish from wounds, without being recovered; or (4), that in most cases the females killed are not either heavy with young, or nursing mothers; or (5), that each and every of these incidents can not be avoided by the *selective* killing which is practiced on the breeding islands. We do not stop to discuss the idle questions whether this form of slaughter will actually *exterminate* the herds, or *how long* it may take to complete the destruction. It is enough for the present purpose to say that it is *simple destruction*. It is destructive, because it does not make, or aim to make, its draft upon the *increase*, which consists of the superfluous *males*, but, by taking females, strikes directly at the stock, and strikes at the stock in the most damaging way, by destroying unborn and newly-born pups, together with their mothers. Whoever undertakes to set up a *moral* right to prosecute this mode of slaughter on the ground that it will not necessarily result in complete destruction, must maintain that while it may be against the law of nature to work *complete* destruction, it is yet lawful *to destroy*! But what the law of nature forbids is any destruction at all, unless it is necessary. To destroy a *little*, and to destroy *much*, are the same crimes.

If there were even something less than a *right*, or rather some *low degree* of right—for nothing other than *rights* can be taken notice of here—some mere *convenience*, it might be worthy of consideration; but there is none. It can not even be said that pelagic sealing may furnish to the world a seal-skin at a lower price. Nothing can be plainer than that it is the most expensive mode of capturing seals. It requires the expenditure of a vast sum in vessels, boats, appliances, and human labor, which is all unnecessary, because the entire increase can be reaped without them. This unnecessary expense is a charge upon the consumer and must be reimbursed in the price he pays. In no way can pelagic sealing result in a cheapening of the product, except upon the assumption that the stock of seals is inexhaustible, and that the amount of the pelagic catch is an addition to the total catch, which might be made on the land if capture were restricted to the land; and this assumption is admitted on all hands, and even by the Commissioners of Great Britain, to be untrue.

If there were any *evil, or inconvenience* even, to be apprehended from a confinement of the capture of the seals to the breeding places, it might serve to arrest attention; but there is none. Much is said, indeed, in the Report of the Commissioners of Great Britain concerning a supposed *monopoly* which would thus be secured, as is pretended, to the lessees of the breeding islands which would enable them to exact an excessive price for skins; but this notion is wholly erroneous.

The annual drafts made at the island from the increase of the herds are not made for, and can not be monopolized, or appropriated, by the United States. They are made for mankind everywhere, and find their way to those who want them and are able to procure them wherever upon the face of the world they may dwell. To the owners of these islands, whoever they may be, they are intrinsically useless, except the insignificant number which may be useful for food or clothing. Their only value to them is as articles of commerce, as means by which needed commodities may be obtained from others who may have a superior desire for the benefits afforded by these animals. They are furnished through the instrumentality of commerce to those who want them upon the same terms upon which they are furnished to the citizens of the United States. The human race thus perfectly secures to itself the benefit which nature intended the animal should supply. Nor can the United States exact from the world whatever price it pleases for the product of the animal. It can not exact a penny more than the world is willing to give; and this, as in the case of every other commodity, is its just value. The cost of production, and the operation of supply and demand will determine the price of this, as of every other, commodity. Any other mode of capturing the animal for the market is obviously and confessedly more expensive, and must necessarily, other things being equal, involve an increased price, and simply impose an additional tax upon the consumer.

There are, indeed, instances of commodities in which the possible supply greatly exceeds the wants of the world, and where, if the whole product were thrown upon the market, it would become almost worthless, producing a sum much less than would have been gained had a comparatively small part only been offered. In such cases, if the sources of supply are a monopoly under a single direction, a large profit may sometimes be secured by an *artificial* limitation of the supply. It is said that the Dutch once found an advantage like this from a voluntary destruction of a large part of the product of the Spice Islands. But

the case of the lessees of the Pribilof Islands is the opposite of this. They never can be even tempted to limit the supply. Nature herself has limited it all too rigidly. A large profit is derivable from every seal which prudence will permit to be taken. The temptation is to take too largely. *Abstinence*, and not *waste*, is the true policy. Indeed, the Report of the Commissioners of Great Britain makes it a principal charge against the management of the lessees that they make drafts upon the herds too large, instead of too small. Now, where the entire product of a source of supply is thrown upon the market, the price will be governed by the demand. The world will pay a certain amount for it and no more; and the circumstance that there is a monopoly of the commodity is unimportant.¹

Divers charges are made in the Report of the British Commissioners of neglect and mismanagement by the lessees of the islands in the conduct of the business of caring for the seals and making the annual drafts from the herds. These topics have but a small measure of relevancy here. They are, with some unimportant exceptions, wholly denied, and will be elsewhere in this argument shown to be erroneous. But if it be intended by these charges to show that the prime object of the law of nature to make the increase of animals available to man and at the same time to preserve the stock, is not most certainly gained in the case of an animal like the seal by declaring a property interest in those who have the power to secure it, some observations upon them are pertinent here. In this aspect these charges proceed upon the assumption that a scheme of protection by care, industry, and select, ive killing is necessary. If this be so, when and how can it be adopted and maintained except through the recognition of a property interest? It can not be questioned that this care and prudence are best secured by bringing into play the motive of self-interest. How can this be done except through the recognition of a property interest? What other device has human society found in any stage of civilization in any land or in any age? What new substitute has the wisdom of these Commissioners to suggest? Is it necessary to tell the breeder of sheep that he must preserve his flocks and make his main drafts for the market upon his superfluous males? It may be admitted that the United States may sometimes fall into errors and neglects against their own interest. They assert for themselves no infallibility; but they do insist that there is no error and no neglect which they could as owners and

¹ Mill. Pol. Econ., Book II, Chap. 5, § 2.

cultivators of these herds commit which would be in violation of the teachings of science and the laws of nature and operate to obstruct the enjoyment by mankind of the full product of the animal, which would not at the same time, and in larger measure, result in loss and injury to themselves. They have not and can not have, upon the grounds taken in this argument, any interest which, in the slightest degree, conflicts with that of the world at large. They would be grateful to have any errors in the management by them pointed out, to the end that they might apply a remedy. And what is true in respect of the United States is true also of their lessees. The latter can have no interest not in harmony with the interests of all. This observation is subject to a qualification limited to lessees whose lease is about to expire. An outgoing tenant is, indeed, sometimes under a temptation to commit waste. Against this possible mischief the United States have endeavored to guard by the policy of making long leases. It is believed to have been entirely effectual.

But all suggestions of the insufficiency of the guaranties furnished by a recognition of a property interest to carry out the dictates of science and natural law in respect to animals having a nature and habits such as the fur-seal exhibits are absolutely silenced by a reference to the conclusive teachings of actual and long experience. Russia enjoyed during the whole period of her occupation of the islands the full benefit practically of a property interest. She maintained an exclusive dominion of the herds upon the land, and no attempt to interfere with them by pelagic sealing was made. By her care, industry, and self-denial, tempted and rewarded by the profits of the industry, the normal numbers of the herds were maintained, and at the same time large annual drafts were made. And when, as happened more than once from exceptional causes which could not be prevented, the numbers were greatly reduced, a more rigid and self-enforced abstinence brought about a full restoration. At the beginning of the occupation of the United States, and before their authority and oversight were fully established, an irregular and excessive slaughter again greatly reduced the herds, and this damage was again fully repaired by an exercise of similar abstinence. The numbers were, perhaps, more than restored, and it became possible to make larger drafts than had ever been taken under the Russian management without any discoverable diminution of the stock; and there is no reason to suppose that such drafts might not have been continued indefinitely had not the destruc-

tive warfare by a constantly increasing fleet of Canadian sealers made it impossible.

The experience at the Commander Islands has been the same. The exercise of art, industry, and self-denial produced by the operation of the same motive has been followed by the reward of still abundant herds.

Nor is there any obstacle in the way of a recognition of a property interest growing out of any difficulty in *identifying* the Alaskan herd upon the high seas. Suggestions of a possible commingling with the herds belonging to the Russian islands on the western side of the Pacific and Bering Sea are contained in the Report of the British Commissioners; but these are coupled with the admission that this commingling, if it exist at all, is confined to a few individuals. They are supported by no evidence. The Russian herds are separated by a broad tract, hundreds of miles in width, and it seems entirely certain that all seals found on the eastern side of the Pacific and Bering Sea are members of the Alaskan herds.

It may be urged, as an objection to the recognition of a property interest in the United States, that it would be inconsistent with the continued pursuit of seals by the Indians on the Northwest coast for the purposes of food and clothing. This consideration deserves respectful attention. It is the only form of capturing seals upon the high seas which can assert for itself a moral foundation under the law of nature. Attention has more than once been called in this argument to the different degrees of the extension of the institution of property in barbaric and in civilized life. The *necessities of society*, everywhere and at all times the measure of the extension of the institution, do not in barbaric life require a recognition of property in but comparatively few things. With a scanty and sparse population, little is required by way of cultivating the earth or its animals; and both can be, and generally are, allowed to remain in a wild condition, open to indiscriminate use. A full supply of the wants of such society in respect to most animals can be had by indiscriminate killing, without in the least degree endangering the stock. That peril is one which civilization brings along with it; and, as we have seen, the safeguard comes also in the shape of the extension of the institution of property. Nothing better illustrates this than the case of the fur-seals. Before the occupation of its haunts by civilized nations, the only draft made by man upon the prodigious herds was limited to a number sufficient to supply the wants

of a few hundred people. But, after such occupation, through the instrumentality of commerce, the whole world made its attack. This demand, of course, could not be supplied consistently with the preservation of the species without an immediate change from barbaric to civilized methods; that is to say, from indiscriminate capture, which threatened the stock, to a selective capture confined to the increase.

But this condition creates no difficulty. The demand thus made is comparatively insignificant, and does not threaten any danger. The United States have no desire or intention to cut off from these rude inhabitants any of their means of subsistence. Their history and circumstances have made them familiar with the survivals of barbaric life in the midst of civilized conditions. They have steadily pursued the policy of securing to such tribes, as long as possible, the benefit of the sources of subsistence upon which they had been accustomed to rely. They suppose it may be safely left to them to insure to these people such an enjoyment of the seal herds as they originally had, or the property interest which they justly claim may be recognized *subject* to a reasonable use by the Indians upon the coast, such as they have heretofore enjoyed. But, surely, this claim of the Indians can not be made a cover for the prosecution of a destructive warfare upon a valuable race of animals. The civilized man can not assert for himself the license of the barbarian. If that can not be confined to the barbarian, it must be given up altogether. The exacting demands of civilization must be met by the methods of civilization.

It may be asked whether the claim made by the United States goes to the extent of asserting a legal right of property in *any individual seal* which may at any time be found in the seas between the Pribilof Islands at the north and the coast of California at the south? And whether they would insist that in the case of any seal captured anywhere within those limits by any person other than a native Indian, and for purposes of scientific curiosity, or to satisfy hunger, a trespass had been committed upon the property of the United States, and an action might be maintained in their name in a municipal tribunal to recover damages, or for the recovery of the skin of the animal, if it should anywhere be found. The United States do not insist upon this extreme point, because it is not necessary to insist upon it. All that is needed for their purposes is that their *property interest* in the *herds* should be so far recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them

on the islands upon the basis of their property interest. The conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd, is clear and intelligible; and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest.

It is, of course, necessary to an actual appropriation of property that the *intent* to appropriate should be evidenced by some act. This requirement has been fully satisfied by the United States. Every act by which that intent could be manifested has been performed. They have, in every practicable form, exercised art, industry, and self-denial in protecting the seals upon their soil and gathering the increase for the purposes of commerce with the world, and they have in all practicable forms, by their laws, by executive proclamation, and the exercise of force upon the high seas, endeavored to prohibit all invasions of their property interest.

It is believed that of the three conditions hereinbefore mentioned as requisite to assert a right of property in the seal herd, a compliance with the only one which can be the subject of debate, namely, *susceptibility of appropriation*, has now been fully established; and we need no longer delay the final conclusion that the United States, and they alone, having such a control over the Alaskan seal herd as enables them by the practice of art, industry, and self-denial to make the entire product fully available for the wants of mankind without diminishing the stock, and having asserted this control and exercised the requisite art, industry, and self-denial in order to accomplish that great end, have, under principles everywhere recognized, both in the law of nature and in the concurring municipal jurisprudence of all civilized States, a property interest in that herd.

It is a satisfaction to the undersigned, and, as they conceive, no unimportant feature of their argument, that in the foregoing discussion no selfish pretension had been asserted by the United States, nor one in the least degree hostile to Great Britain. The Government of the United States neither asserts any principle, nor asks for any adjudication which is not for the common interest of the world as much as for itself. The fundamental truth that this useful race of animals is the property of mankind is not changed by the circumstance that the custody and defense of it have fallen to the lot of the United States. Their appearance as a litigant in this forum may be said, in a very just sense, to be fortuitous. The *real* controversy is between

those, wherever they may dwell, who *want* the seals, and the Canadian *pelagic sealers*, who are threatening the extermination of them. If that danger can be averted by the method which alone can be effective, the recognition of a property interest in the United States, the benefit will accrue equally to all. The seal-skins will be furnished to the citizens of Great Britain and of all other nations upon the same terms upon which they are obtainable by citizens of the United States. The large interests of Great Britain in the manufacture of the skins will be relieved from the peril which threatens them. None will be losers, save those who are engaged in the cruel pursuit, forbidden by the law of nature, and by every sentiment of humanity, of destroying this useful race of animals. And the loss even to them would be comparatively small, for the pursuit under present conditions can not continue for more than a very short period.

The United States may, indeed, derive a profit peculiar to themselves as the cultivators of the herd; but this is the just reward of their industry, abstinence, and care, and no more than every other nation in respect to products peculiar to itself. Without these voluntary efforts the herds would be speedily swept away. Their present existence and numbers are absolutely due to these efforts. It is by such means alone that nature makes her gifts fully available to their desired extent to all nations. The advantages which, in the partition among nations, have fallen under the power of the United States, it is their duty, and their duty to mankind, to improve. The rights and interests of mankind are properly asserted in this international forum; but they can be asserted only through the United States. If the world has the right, as it certainly has, to call upon that nation to make the benefits which nature has assigned to its custody available, it must clothe it with the powers which are requisite to that end.

If the United States have, as has now been shown, a property interest in the Alaskan herd, the undersigned conceives it to be a certain consequence that they have the right to protect it anywhere upon the high seas against injury or invasion, by such reasonable exercise of force as may be necessary. This proposition will be fully discussed in connection with the subject next to be considered, of the rights acquired by the United States in the sealing industries carried on by them upon the Pribilof Islands.

If the foregoing argument is successful in showing that the United States have a property in the Alaskan seal herd their right to protect

that property anywhere upon the seas where it and they have the right *to go* is a proposition scarcely open to question. The rights of a nation of all descriptions upon the high seas are uniformly protected by the direct exercise of the powers of the nation. There is no other way of protecting them. There is no general sovereign or tribunal over nations before which an alleged trespassing nation can be summoned for judgment. But the nature and extent of this self-protection will be fully discussed under the next head of this argument, devoted to that aspect of the property question particularly presented by the sealing industry maintained by the United States upon the Pribilof Islands. If they have the right to protect that *industry* against invasion by acts committed upon the high seas, they have, *a fortiori*, the same right to protect their *property* on that element.

JAMES O. CARTER.

APPENDIX TO PART THIRD, DIVISION I (MR. CARTER'S ARGUMENT).

AUTHORITIES UPON THE SUBJECT OF PROPERTY IN ANIMALS FERÆ NATURÆ.

[From *Studies in Roman Law*, by Lord Mackenzie (6th edition), Edinburgh and London, 1886, chapter III, page 174.]

Wild animals.—All wild animals, whether beasts, birds or fish, fall under this rule, so that even when they are caught by a trespasser on another man's land they belong to the taker, unless they are expressly declared to be forfeited by some penal law, (Inst., 2, 1, 12; Gaius, 2, 66–69; Dig., 41, 1, 3, pr. 55). Deer in a forest, rabbits in a warren, fish in a pond, or other wild animals in the keeping or possession of the first holder can not be appropriated by another unless they regain their liberty, in which case they are free to be again acquired by occupancy. Tame or domesticated creatures, such as horses, sheep, poultry, and the like, remain the property of their owners, though strayed or not confined. The same rule prevails in regard to such wild animals already appropriated as are in the habit of returning to their owners, such as pigeons, hawks in pursuit of game, or bees swarming while pursued by their owners (Inst., 2, 1, 14, 15).

[From Gaius's *Elements of Roman Law*, translated by Edward Poste, (2d ed.), Oxford. 1875.]

SEC. 68. In those wild animals, however, which are habituated to go away and return, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down that only the cessation of the instinct of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the instinct of returning is held to be lost when the habit of returning is discontinued.

[From Von Savigny on *Possession in the Civil Law*, compiled by Kelleher.]

With respect to the possession of animals these rules are to be applied thus:

First. Tame animals are possessed like all other movables, *i. e.*, the possession of them ceases when they can not be found. Second. Wild animals are only possessed so long as some special disposition (*custodia*) exists which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment (lib. 3, secs. 14, 15, *de poss.*). Third. Wild beasts,

tamed artificially, are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them (*donec animus, i. e., consuetudinem, revertendi habent*).

[From Puffendorf, Law of Nature and Nations, lib. III, cap. 1, sec. 3.]

Although a loss seems to refer properly to property, yet by us it will be generally accepted as embracing all injury that relates to the body, fame and modesty of man. So it signifies every injury, corruption, diminution or removal of that which is ours, or interception of that, which in perfect justice we ought to have; whether given by nature or conceded by an antecedent human act or law; or, finally, the omission or denial of a claim which another may have upon us by actual obligation. To this tends the 13th Declamation of Quintilian, where he plainly shows that one had inflicted a loss who poisoned the flowers of his own garden whereby his neighbor's bees perished. Yet the convincing reason consists in this: Since all agree that bees are a wandering kind of animate life, and because they can in no way be accustomed to take their food from a given place; therefore, whenever there is a right of taking them, there also, it is understood, is laid a general injunction to be observed by all neighbors, to permit bees to wander everywhere without hindrance from anyone.

[From Bracton, lib. II, cap. 1.] -

The dominion over things by natural right or by the right of nations is acquired in various ways. In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same reason, if they escape from my keeping, and recover their natural liberty they cease to be mine, and again belong to the first taker. But they recover their natural liberty, then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances, that it is impossible for me to overtake them.

Occupation also comprises fishing, hunting, and capturing; pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary. Occupation also includes shutting up, as in the case of bees, which are wild by nature, for if they should have settled on my tree they would not be any the more mine, until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive, is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft

unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise.

What has been said above applies to animals which have remained at all times wild; and if wild animals have been tamed, and they by habit go out and return, fly away, and fly back, such as deer, swans, seafowls, and doves, and such like, another rule has been approved, that they are so long considered as ours as long as they have the disposition to return; for if they have no disposition to return they cease to be ours. But they seem to cease to have the disposition to return when they have abandoned the habit of returning; and the same is said of fowls and geese which have become wild after being tamed. But a third rule has been approved in the case of domestic animals, that although tame geese and fowls have escaped out of my sight, nevertheless, in whatever place they may be, they are understood to be mine, and he commits a theft who retains them with the intention of making gain with them. This kind of occupation also takes place in the case of those things which are captured from the enemy, as, for instance, if free men have been reduced into slavery and shall escape from our power they recover their former state. Likewise the same species of occupation has a place in the case of those things which are common, as in the case of the sea and the seashore, in the case of stones and gems and other things found on the seashore. The same rule applies to islands which spring up in the sea and to things left derelict, unless there is a custom to the contrary in favor of the public treasury.

[From Bowyer, *Modern Civil Law*, page 72.]

Wild animals, therefore, and birds, and fish, and all animals that are produced in the sea, the heavens, and the earth, become the property, by natural law, of whoever takes possession of them. The reason of this is, that whatever is the property of no man becomes, by natural reason, the property of whoever occupies it.

It is the same whether the animals or birds be caught on the premises of the catcher or on those of another. But if any one enters the land of another to sport or hunt, he may be warned off by the owner of the land. When you have caught any of these animals it remains yours so long as it is under the restraint of your custody. But as soon as it has escaped from your keeping and has restored itself to natural liberty, it ceases to be yours, and again becomes the property of whoever occupies it. The animal is understood to recover its natural liberty when it has vanished from your sight, or is before your eyes under such circumstances that pursuit would be difficult.

Here we find the celebrated maxim of Gajus: *Quod nullius est, id ratione naturali occupanti conceditur*. It is founded on the following doctrine: Granting the institution of the rights of property among mankind, those things are each man's property which no other man has a right to take from him. Now, no one has a right to that which is *res nullius*; consequently, whoever possesses *rem nullius* possesses that which no one has a right to take from him. It is therefore his property.

But this general right of acquiring things by occupancy is subject to an important qualification. Grotius justly argues that it is not an absolute right, for though it is indeed founded on natural law, it is matter of permissive law, and not one which requires that full liberty should be left to men to avail themselves of it, since such liberty is unnecessary in many cases for the welfare of mankind, and may even, as Blackstone observes, be prejudicial to the peace of society if it be not

limited by positive law. Barbeyrac also argues that where a country is taken possession of by a body of men, it becomes the property of that body or of the person who represents them, and that therefore the right of the individual members to take possession of portions of it or any of the things therein contained, may be restricted or taken away, according as the welfare of the community may demand. These principles are applicable to the whole jurisprudence of acquisition by occupancy.

The acquisition of things tangible must be made *corpore et animo*—that is to say, by an outward act signifying an intention to possess. The necessity of an outward act to commence holding a thing in dominion is founded on the principle that a will or intention can not have legal effect without an outward act declaring that intention, and on the other hand no man can be said to have the dominion over a thing which he has no intention of possessing as his. Thus a man can not deprive others of their right to take possession of vacant property by merely considering it as his, without actually appropriating it to himself; and if he possesses it without any will of appropriating it to himself it can not be held to have ceased to be *res nullius*.

The intention to possess is to be presumed wherever the outward act shows such an intention, for that is to be presumed which is most probable.

The outward act or possession need not, however, be manual, for any species of possession, or, as the ancients expressed it, *custodia*, is a sufficient appropriation.

The general principle respecting the acquisition of animals *feræ naturæ* is, that it is absurd to hold anything to be a man's property which is entirely out of his power. But Grotius limits the application of that principle to the *acquisition* of things, and therefore justly dissents from the doctrine of Gajus given above, that the animal becomes again *res nullius* immediately on recovering its liberty, if it be difficult for the first occupant to retake it. He argues that when a thing has become the property of any one, whether it be afterwards taken from him by the act of man, or whether he lose it from a natural cause, he does not necessarily lose his right to it together with the possession; but that it is reasonable to presume that the proprietor of a wild animal must have renounced his right to it when the animal is gone beyond the hope of recovery and where it could not be identified. He, therefore, argues that the right of ownership to a wild animal may be rendered lasting, notwithstanding its flight, by a mark or other artificial sign by which the creature may be recognized.

With regard to fish, Voet argues that when they are included within artificial boundaries they are private property, but that when they are in a lake or other large piece of natural water, though the proprietor of the land may have a right of fishery there, yet the fish are in their natural state of liberty, and consequently they can not be his property until he has brought them within his power by catching them.

It was disputed among the ancient Roman juriconsulti whether a wild animal becomes immediately the property of whoever wounds it so that it can be secured, or whether it becomes the property of him only who actually secures it. And Justinian confirmed the latter opinion, because many circumstances might occur to prevent the wounded animal being taken by him who wounded it.

Bees, also, are of a wild nature, and, therefore, they no more become the property of the owner of the soil by swarming in his trees than do the birds which build in them; and they are not his unless he inclose them in a hive. Consequently, whoever hives them makes them his own. And

while they are wild any one may cut off the honeycombs, though the owner of the land may prevent this by warning off trespassers. And a swarm flying from a hive belongs to the owner of the hive so long as it is within his sight, but otherwise it is the property of whoever takes possession of it.

With regard to creatures which have the habit of going and returning, such as pigeons, they remain the property of those to whom they belong so long as they retain the *animus revertendi* or disposition to return. But when they lose that disposition they become the property of whomsoever secures them. And they must be held to have lost the *animus revertendi* as soon as they have lost the habit of returning. Such are the doctrines of the Roman law, which are conformable to the English law, with the qualification of Grotius, which is applicable to the case of all animals *feræ naturæ*, that is to say, that a mark or collar prevents the rights of the proprietor of a wild animal being extinguished by its escape from his sight and pursuit.

[From Cooper's Justinian (lib. II, tit. 1, secs. 11 *et seq.*.)]

SEC. 11. *De Rebus Singulorum.*—There are various means by which things become private property. Of some we obtain dominion by the law of nature, which (as we have already observed) is also called the law of nations; of others, by the civil law. But it will be most convenient to begin from the more ancient law; that law, which nature established at the birth of mankind; for civil laws could then only begin to exist when cities began to be built, magistracies to be created, and laws to be written.

SEC. 12. *De Occupatione Ferarum.*—Wild beasts, birds, fish and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by the law of nations, the property of the captor; for natural reason gives to the first occupant, that which had no previous owner; and it is not material whether the man takes wild beasts or birds upon his own, or upon the ground of another; although whoever hath entered into the ground of another for the sake of hunting or fowling, might have been prohibited by the proprietor, if he had foreseen the intent. Whatever of this kind you take, is regarded as your property while it remains under your coercion; but when it hath escaped your custody, and recovered its natural liberty, it ceases to be yours and becomes the property of the first who seizes it. It is understood to have recovered its natural liberty, if it hath escaped your sight; or although not out of sight, yet if it can not be pursued and retaken without great difficulty.

SEC. 13. *De Vulneratione.*—It hath been questioned, whether a wild beast belongs to him, by whom it hath been so wounded, that it may be taken. And, in the opinion of some, it doth so, as long as he pursues it; but, if he quits the pursuit, it ceases to be his, and again becomes the right of the first occupant. Others have thought that property in a wild beast must attach to the actual taking it. We confirm this latter opinion; because many accidents happen, which prevent the capture.

SEC. 14. *De Apibus.*—Bees also are wild by nature; therefore, although they swarm upon your tree, they are not reputed, until they are hived by you, to be more your property than the birds which have nests there; so, if any other person inclose them in a hive, he becomes their proprietor. Their honeycombs also, if any, become the property of him who takes them; but clearly, if you observe any person entering into your ground, the object untouched, you may justly hinder him. A

swarm which hath flown from your hive is still reputed to continue yours as long as it is in sight and may easily be pursued, but, in any other case it will become the property of the occupant.

SEC. 15. *De Paronibus, et Columbibus, et Cæteris Animalibus Mansuefactis.*—Peacocks and pigeons are also naturally wild; nor is it any objection that after every flight, it is their custom to return; for bees that are naturally wild do so too. Some have had deer so tame that they would go to the woods and return at regular periods; yet no one denies but that deer are wild by nature. But, with respect to animals, which go and return customarily, the rule is, that they are considered yours, as long as they retain an inclination to return; but, if this ceases, they cease to be yours; and will again become the property of those who take them.

[The Case of Swans. (7 Coke, 15 b.)]

It was decided that a prescription to have all wild swans which are *feræ naturæ*, and not marked, building their nests, breeding, frequenting within a particular creek, is not good. For “the prescription was insufficient, for the effect of the prescription is to have all wild swans, which are *feræ naturæ*, within the said creek. And such prescription for a warren would be insufficient, as, for example, to have all partridges *nidificantes gignentis*, and frequenting within his manor. But he ought to say to have free warren of them within his manor; he can not have them *jure privilegii* but so long as they are within the place. But it was resolved that if the defendants had alleged that within the said creek there had been time out of mind a game of wild swans not marked, building and breeding; and then had prescribed, that such abbot and all his predecessors had used at all times to have and to take to their use some of the said game of wild swans and their cignets within the said creek, it had been good: for all those swans are royal fowls, yet in such manner a man may prescribe in them; for that may have a lawful beginning by the King’s grant. For in the 30th Edward III the King granted to C. W. all wild swans unmarked between Oxford and London for seven years. A like grant was made of wild swans unmarked in the County of Cambridge to Beresford, K. T. G., by which it appears that the King may grant wild swans unmarked; and by consequence a man may prescribe in them in a certain place because it may have a lawful beginning. And a man may prescribe to have a royal fish within his manor as it is held in 39th Edward III, 35, for the reason aforesaid and yet without prescription they do belong to the King by his prerogative.”

In the same case it was said that there are three manner of property rights; property absolute, property qualified, property possessory. Property qualified and possessory a man may have in those animals which are *feræ naturæ*, and to such property a man may attain by two ways: by industry, or by *ratione impotentia et loci*. By industry as by taking them or by making them *mansueta* or *domestica*. But in those which are *feræ naturæ* and by industry are made tame a man hath but a qualified property in them, namely, so long as they remain tame, for if they do attain to their natural liberty and have not *animus revertendi*, the property is lost. *Ratione impotentia et loci* as if a man has young goshawks or the like which are *feræ naturæ* and they build in my land, I have possessory property in them, for if one takes them when they can not fly the owner of the soil shall have an action of trespass. But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren

&c., he hath not any property in the deer, or conies, or pheasants, therefore in his action he shall not say *suos*, for he hath no property in them and they do belong to him for his game and pleasure so long as they remain in the privileged place.

It was resolved that all white swans not marked, which have gained their natural liberty, and are swimming in an open and common river, might be seized to the King's use by his prerogative, because *Volatilia (quæ sunt fera naturæ) alia sunt regalia, alia communia*; * * * as a swan is a royal fowl; and all those, the property whereof is not known, do belong to the King by his prerogative; and so whales, and sturgeons, are royal fish, and belong to the King by his prerogative. * * * But it was resolved also that the subject might have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him and not to the King; and if they escape out of his private waters into an open and common river, he may bring them back and take them again. And therewith agreeth Bracton (lib. 2, c. 1, fol. 9): *Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, (ut sunt cerri, cigni, parones, et columbæ, et hujusmodi) eousque nostra intelligantur quamdiu habuerint animum revertendi*. But if they have gained their natural liberty, and are swimming in open and common rivers, the King's officer may seize them in the open and common river for the King; for one white swan without such pursuit as aforesaid can not be known from another; and when the property of a swan can not be known, the same being of its nature a fowl royal, doth belong to the King; and in this case the book of 7 H, 6, 27, b, was vouched, where Sir John Tiptoft brought an action of trespass for wrongful taking of his swans; the defendant pleaded that he was seized of the lordship of S, within which lordship all those whose estate he hath in the said lordship had had time out of mind all estrays being within the same manor; and we say, that the said swans were estraying at the time in the place where, etc., and we as landlords did seize and make proclamations in fairs and markets; and so soon as we had notice that they were your swans, we delivered them to you at such a place.

The plaintiff replied that he was seized of the manor of B, joining to the lordship of S, and we say, that we and our ancestors, and all those, etc., have used time out of mind to have swans swimming through all the lordship of S, and we say, that long time before the taking we put them in there, and gave notice of them to the defendant that they were our swans, and prayed his damages. And the opinion of Strange there was well approved by the court, that the replication was good; for when the plaintiff may lawfully put his swans there, they cannot be estrays, no more than the cattle of any one can be estrays in such place where they ought to have common; because they are there where the owner hath an interest to put them, and in which place they may be without negligence or laches of the owner. Out of which case these points were observed concerning swans.

1. That every one who hath swans within his manor—that is to say, within his private waters—hath a property in them, for the writ of trespass was of wrongful taking his swans, scil. *Quare cignos suos*, etc.

2. That one may prescribe to have a game of swans within his manor, as well as a warren or park.

3. That he who hath such a game of swans may prescribe that his swans may swim within the manor of another.

4. That a swan may be an estray, and so can not any other fowl, as I have read in any book.

[Child v. Greenhill (3 Croke, 553).]

Trespass for entering and breaking plaintiff's close and fishing and taking fish in his several fishery. Contended for the defendant that he could not say "his" fishes, for he hath not any property in the fish until he takes them and has them in his possession. Attorneys for plaintiff maintained that they were in his several fishery, and that he might say "his" fishes, for there was not any other that might take them, and all the court was of that opinion.

[Keeble v. Hickeringill, 11 East's, 574.]

Action upon the case. Plaintiff declares that he was, November 8, in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, *et de quodam vivario vocato*, a decoy pond, to which divers wild fowl used to resort and come; and the plaintiff had, at his own costs and charges, prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them; the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl used to resort thither, and deprive him of his profit, did on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond; and on the 11th and 12th days of November the defendant, *with design to damnify the plaintiff, and fright away the wild fowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wild fowl were frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

Holt, C. J.: I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, first, this using or making a decoy is lawful; secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him.

* * * * *

And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into these ponds wild fowl in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished, there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefits and have their action. But, in short, that which is the true reason is that this action is not

brought to recover damage for the loss of the fowl, but for the disturbance.

In the report of this same case in the 11th Modern, 75, Lord Chief Justice Holt says: "Suppose the defendant had shot in his own ground; if he had occasion to shoot it would be one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." It should seem to be as if he fired for the purpose of disturbing the wild fowl in his neighbor's decoy, that he might take the chance of benefiting himself by shooting them on the wing in consequence of such disturbance.

[Amory v. Flynn (10 John., 102).]

In error, on certiorari, from a justice's court. Amory brought an action of trover against Flynn before the justice for two geese. There was a trial by jury. The plaintiff proved a demand of the geese and a refusal by the defendant unless the plaintiff would first pay 25 cents for liquor furnished to two men, who had caught the geese and pledged them to the defendant for it. The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed away twice before, and did not return until brought back. The plaintiff proved property in them, and that after the geese had left his premises the son of the defendant was seen pursuing them with dogs, and was informed that they belonged to the plaintiff. The jury found a verdict for the defendant, on which the justice gave judgment.

Per Curiam: The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no color for the inference that the geese had regained their natural liberty as wild fowl, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the *lien* which he supposed he had acquired by the pledge. This claim was not well founded, for he showed no right in the persons who pawned them for the liquor so to pawn them, and he took them at his peril. Here was clearly an invasion of private right. If the person who took the geese, or who had kept them, had been put to necessary expense in securing them, such expense ought to have been refunded; but no such expense was shown or pretended, and to sanction such a pawn as this would lead to abuse and fraud.

A person who takes up an *estrays* can not levy a tax upon it but by way of amends of indemnity. This is the doctrine of the common law, (1 Roll. Abr., 879, c. 5; Noy's Rep., 144; Salk., 686), and the Roman lawyers equally denied to the finder of any lost property a *reward* for finding it *non probe petat aliquid*, says the Digest (Dig. 47, 2, 43, 9). And, indeed, the civil law (*ibid.* s. 4) considered it as a theft to convert to one's use, *animo lucrandi*, property found, without endeavors to find the owners, or without intention to restore it. But theft was not always considered, in that law, in the very odious sense of our common law; for as to the class of thefts denominated thefts not *manifest*, and of which this was one, that law provided only a civil remedy of double damages. A. Gellius (Noct. Alt. lib. 11, c. 18), who cites the very passage in the civil law which declares such conduct theft, gives that appellation to many acts which our law does, and ought to regard as trespasses merely; such, for instance, as ouster of possession of land. But, taking the civil law in the milder sense, it sufficiently

shows what was considered, in the wisdom of the ancients, as right and duty, in this case. The practice of mankind is apt to be too lax on this subject; and, when occasion offers, courts ought to lay down and enforce the just and benevolent lesson of morality and law.

The verdict, in this case, being against law and evidence, can not be supported. Judgment reversed.

[Goff vs. Kilts (15 Wend., 550).]

"The owner of *bees* which have been reclaimed, may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees and takes the honey.

"Where bees takes up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*, but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he can not enter upon the lands of the other to retake them without subjecting himself to an action of trespass."

Error from the Madison common pleas. Kilts sued Goff in a justice's court in *trespass* for taking and destroying a swarm of *bees*, and the honey made by them. The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered. Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others. The plaintiff recovered judgment, which was affirmed by the Madison common pleas. The defendant sued out a writ of error.

By the court, Nelson, J.: Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is hiving or inclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. (2 Black. Comm., 393; 2 Kent's Comm., 394.)

The question here is not between the owner of the soil upon which the tree stood that included the swarm, and the owner of the bees; as to him, the owner of the bees would not be able to regain his property, or the fruits of it, without being guilty of trespass; but it by no means follows, from this predicament, that the right to the enjoyment of the property is lost; that the bees therefore become again *feræ naturæ* and belong to the first occupant. If a domestic or tame animal of one person should stray to the inclosure of another, the owner could not follow and retake it without being liable for a trespass. The absolute right

of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like remedy existed in case of an invasion of it. It can not, I think, be doubted that if the property in the swarm continues while within sight of the owner—in other words, while he can distinguish and identify it in the air—that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game, (game laws out of the question) belong to the owner or occupant of the forest, *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says: If a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. (2 Black. Com., 419.) But if animals *feræ naturæ* that have been *reclaimed*, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he can not pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty.

The rights of both parties should be regarded and reconciled, as far as is consistent with a reasonable protection of each. The case of *Heermance vs. Vernay* (6 Johns. R., 5), and *Blake vs. Jerome* (14 *id.*, 406), are authorities for saying, if any were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another, without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil, therefore, acquiring no right to the property in the bees, the defendant below can not protect himself by showing it out of the plaintiff in that way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person, who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguishable from the cases of *Gillett vs. Mason* (7 Johns. R., 16), and *Ferguson vs. Miller* (1 Cowen, 243). The first presented a question between the finder and a person

interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the swarm, according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli*. For these reasons I am of opinion that the judgment of the court below should be affirmed. Judgment affirmed.

[The opinion of Baron Wilde in *Blades v. Higgs* (12 C. B. N. S., 512).]

I wish to add a few words, as I think the doctrine of animals *feræ naturæ* has in modern times been sometimes pushed too far. It has been urged in this case that an animal *feræ naturæ* could not be the subject of individual property. But this is not so; for the common law affirmed a right of property in animals even though they were *feræ naturæ*; if they were restrained either by habit or inclosure within the lands of the owner. We have the authority of Lord Coke's Reports for this right in respect of wild animals, such as hawks, deer, and game, if reclaimed, or swans or fish, if kept in a private moat or pond, or doves in a dove cote. But the right of property is not absolute; for, if such deer, game, etc., attain their wild condition again, the property in them is said to be lost.

The principle of the common law seems, therefore, to be a very reasonable one, for in cases where either their own induced habits or the confinement imposed by man have brought about in the existence of wild animals the character of fixed abode in a particular locality, the law does not refuse to recognize in the owner of the land which sustained them a property coëxtensive with that state of things. When these principles were applied to a country of few inclosures, as in old times, the cases of property in game would be few; but the inclosures and habits of modern times have worked a great change in the character of game in respect to its wildness and wandering nature; and there is a vast quantity of game in this country which never stirs from the inclosed property of the proprietor by whose care it is raised and on whose land it is maintained.

It is, I think, now too late for the courts of law to meet this change of circumstances by declaring a property in live game; but if the legislature should interfere, as was suggested in argument, by giving to the owner of lands a property in game, either absolute or qualified, so long as it remained on his land, it would only be acting in the spirit and policy of the common law.

Mellor, J., concurred. Judgment affirmed.

[*Morgan and another, Executors of John, Earl of Abergavenny, deceased, v. William, Earl of Abergavenny* (8 C. B., 768).]

This was an action of trover. * * * The defendant pleaded, first, not guilty, except as to the said causes of action as to twelve bucks, one stag, eight does, and four fawns, parcel of the said bucks, stags, does, and fawns, respectively, in the declaration mentioned; secondly, that, except as aforesaid, the said John, Earl of Abergavenny, in his lifetime was not possessed, neither were the plaintiffs, as executors as aforesaid, after the death of the said John, Earl of Abergavenny, possessed, of the said deer or other animals in the declaration mentioned, or any of them, as of his or their own property, respectively; thirdly, that, except as aforesaid, the said deer and other animals in the declaration mentioned were not, nor was any of them, captured and reclaimed

from their natural and wild state, or tamed or kept confined or inclosed; fourthly, payment of £85 into court in respect of the excepted bucks, stags, does, and fawns.

The plaintiffs joined issue on the first three pleas and took the £85 out of court in satisfaction *pro tanto*.

The cause was tried before Coltman, J. and a special jury at the sittings at Westminster, after Hilary term, 1847.

The action was brought to recover the value of the deer which were in the park appertaining to Eridge Castle, in the County of Sussex, the principal country residence of the Earls of Abergavenny, at the time of the decease of John, the late earl, on the 12th of April, 1845.

The plaintiffs were Richard Morgan and Azariah Ellwood, the executors of the late earl, the defendant was his brother, who, the late earl having died a bachelor, succeeded to the title and to the family entailed estates.

At the time of the late earl's death, the deer in Eridge Park consisted of five hundred and forty head of fallow deer, and one hundred head of red deer in what was called the Deer Park, twelve bucks in a place called the New Park, and six stags and two bucks which were stalled for fattening.

Eridge Park was an ancient park, forming part of the ancient manor of Rotherfield—called in Domesday Book *Reredfelle*—which, it seems, was royal demesne of the fee of Odo, Bishop of Baienx, brother of William the Conqueror, and therefore held by the Saxon Earl Godwin. In Domesday Book it is thus described:

"The land consists of twenty-six carucates in demesne, four carucates and fourteen villeins with six bordarers, having fourteen ploughs. There are four servi and wood sufficient to feed four score hogs. There is a park. In the time of King Edward the Confessor, it was worth £16; and afterwards £14; now £12; and, nevertheless, renders £30."

The substance of the evidence given on the part of the plaintiffs was as follows:

In modern times, Eridge Old Park has consisted of about 900 acres, a great portion of which is of a rough, wild description, containing a considerable quantity of fern, brake, and gorse. The new park adjoining consists of about 200 acres. Some additions were about forty years ago made to the Old Park by the removal of portions of the ancient fences, and erecting paling round the land so added. The deer usually had the range of the Old Park, where they were attended by keepers and fed in the winter with hay, beans, and other food. The does were watched in the falling season, and the fawns marked as they were dropped, in order to ascertain their age and to preserve the stock. At times, certain of the deer were selected from the herd and caught, with the assistance of lurches muzzled, or with their teeth drawn, and turned into an inclosure in the new park, or into pens or stalls for the purpose of fattening them for consumption, or for sale to venison dealers. The ordinary mode of killing them was by shooting. There was a slaughter-house in the park for preparing and dressing the carcasses. Some years since a great number of deer were brought to Eridge from Penshurst and other places. Deer sometimes, though rarely, escaped from the park by leaping over the fence. Some of them were described as being very tame, coming close to the keepers when called at feeding times. Witnesses were also called to prove that of late years deer have been commonly bought and sold for profit like sheep or other animals kept for the food of man. * * *

On the part of the defendant the conversion was admitted; but it

boundaries could be ascertained by distinct marks, telling them that the principal question was whether they found for the plaintiffs or for the defendant, the others being only incidental.

The jury retired, and after a protracted absence returned into court, the judge having left; when, upon the associate asking them whether they found for the plaintiffs or the defendant, the foreman answered:

"We find, first, that it was originally a legal park, but that its boundaries have been altered and enlarged; secondly, we find that the deer have been reclaimed from their natural wild state. What the effect of that opinion is we are not lawyers enough to say."

The associate declining to receive their verdict in that form, the jury again retired, and after a short absence returned into court, the foreman (addressing the associate) saying: "You may take it in the first instance as a verdict for the plaintiffs." The associate then asked, "Do you find that there was an ancient park, with the incidents of a legal park?" To which the foreman answered, "We find that it was originally a legal park, but that its boundaries have been altered and enlarged." Associate: "Do you find that there was an ancient park, with the incidents of a legal park?" Foreman: "Yes." Associate: "Do you find that there were distinct marks by which the boundaries could be ascertained?" Foreman: "Yes, there were."

The verdict was accordingly entered for the plaintiffs.

Talfourd, Sergeant, in the following Easter term, obtained a rule nisi for a new trial, on the grounds, first, that there had been no complete finding by the jury, they not having distinctly answered the real question which was submitted to them, viz, whether the deer were wild or reclaimed; secondly, that the learned judge misdirected the jury, in presenting the case to them as if the existence or nonexistence of Eridge Park, with all the legal incidents of a park, was a mere collateral question, whereas it was of the very essence of the inquiry (*Co. Litt.* 8 a.; *The case of Swans*; *Davies v. Powell*); thirdly, that there was no sufficient evidence to warrant the finding.

Humphrey, *Channell*, Sergt., and *Borill*, in Easter term, 1848, showed cause in support of the verdict, and *Talfourd* and *Byles*, *Terfts* and *Willes* supported the rule to show cause.

Maule, J., now delivered the judgment of the court:

This case was argued in Easter term, 1848, before Lord Chief Justice *Wilde* and my brothers *Coltman* and *Cresswell* and myself. In the absence of the Lord Chief Justice, I now proceed to pronounce the judgment, which has been prepared by him, and in substance assented to by us.

This was an action of trover, brought to recover damages for the conversion of a number of deer. The declaration contained two counts. The first count stated that the testator, in his lifetime, was possessed of a certain number of bucks, does, and other descriptions of deer, being captured and reclaimed from their natural wild state and confined in the close of the testator, and that the plaintiffs, after his death, were possessed as executors, and that the defendants afterwards converted the deer, etc. The second count stated that the plaintiffs, as executors, were possessed of the like quantity of deer, which the defendant had converted, to the damage of the plaintiffs.

The defendant, except as to a certain number of bucks, does, and fawns, pleaded not guilty to the whole declaration; and, secondly, that the testator was not possessed, nor were the plaintiffs, as his executors, possessed, of the deer as alleged; thirdly, that except as to a certain number of bucks, does, and fawns, the deer alleged in the dec-

laration were not captured, reclaimed, and tamed, or kept confined in inclosed grounds, as alleged; lastly, as to the excepted bucks, does, and fawns, the defendant paid the sum of £85 into court.

Issue was joined on these pleas.

The cause was tried before the late Mr. Justice Coltman, at the sittings in Middlesex, after Hilary term, 1847, when the jury found a verdict for the plaintiffs upon the issues—testator possessed—plaintiffs possessed—and that the deer were tame and reclaimed.

A rule nisi was afterwards obtained by the defendant in the following Easter term to show cause why there should not be a new trial upon the ground of misdirection, that there had been no sufficient verdict found by the jury, and that, if a sufficient verdict had been found, it was contrary to the evidence.

Several questions arose upon the trial,—first, whether the land called Eridge Park, in the county of Sussex, was an ancient legal park; secondly, whether it continued to be a legal park, or whether it had become disparked by the addition of other lands to the original park, and by the removal, decay, or destruction of the fences, so as to destroy the evidence of the boundaries of such ancient park; and whether the deer kept in such park had been tamed and reclaimed.

In support of the defendant's case various ancient documents were given in evidence to establish that the place in question was an ancient legal park, and that from a very early period down to the time of the death of the testator there had always been a considerable herd of deer maintained in the park. And it was also proved that the place in question, consisting of upwards of 700 acres of land, was, in many parts, of a very wild and rough description. It also appeared by the evidence that certain lands had been added to the original park; and there was some contrariety of evidence in regard to the state of the fences.

It was also proved that a considerable quantity of deer had the range of the park; and that some were tame, as it was called, and others wild. What in particular the witnesses meant by the distinctions of tame and wild was not explained; but it rather seemed that their meaning was that some were less shy and timid than others. It appeared that the deer very rarely escaped out of the boundaries; that they were attended by keepers, and were fed in the winter with hay, beans, and other food; that a few years back a quantity of deer had been brought from some other place and turned into Eridge Park; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then inclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers; that the deer were usually killed by being shot; and that there was a regular establishment of slaughterhouses for preparing and dressing them for use.

Such being the general effect of the evidence, the learned judge stated to the jury, that, by the general law, deer in a park went to the heir-at-law of the owner of the park; but that deer which were tame and reclaimed became personal property, and went by law to the personal representatives of the owner of them, and not to the heir of the owner of the park in which they were kept. And the learned judge left it to the jury, whether the place in question was proved by the evidence to have been an ancient park, with the legal rights of a park, and told

them that, if it had been an ancient park, and the boundaries could not now be ascertained, that the franchise might be forfeited in reference to the crown, but that that would not affect the question between the parties relative to the deer, that question being whether the deer were tamed and reclaimed; which must be determined with reference to the state and condition of the animals, the nature of the place where they were kept and the mode in which they had been treated: and the learned judge stated in writing the questions to be answered by the jury, which were, first, whether they found for the plaintiffs, the executors, or for the defendant, Lord Abergavenny; secondly, whether they found the place to be an ancient park, with the incidents of a legal park; thirdly, whether the boundaries could be ascertained by distinct marks. .

The jury answered, that they found the place to be an ancient park, with all the incidents of a legal park; secondly, that the boundaries of the ancient park could be ascertained. And the jury expressed a wish to abstain from finding for either plaintiffs or defendant; but, upon being required to do so, they found a verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed.

The rule came on for argument in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said. It was supposed that the jury had not found, in terms, for either plaintiffs or defendant, but merely had answered the questions put to them: but it appeared, upon inquiry, that the jury had been required to find a verdict for the plaintiffs or for the defendant, in addition to answering the questions; and that they accordingly returned a verdict for the plaintiffs.

The second objection was that the judge had misdirected the jury; and it has been contended, in support of that objection, that the judge must be held to have misdirected the jury in having omitted to impress sufficiently upon them the importance of the fact of the deer being kept in an ancient legal park.

But the judge *did* distinctly direct the attention of the jury to the fact of the deer being in a legal park, if such should be their opinion of the place, as an important ingredient in the consideration of the question whether the deer were reclaimed or not when he directed them that the question whether the deer had been reclaimed must be determined by a consideration, among the other matters pointed out, of the nature and dimensions of the park in which they were confined; and we do not perceive any objectionable omission in the judge's direction in this respect, unless the jury ought to have been directed that such fact was conclusive to negative the reclamation of the deer.

It has not been, on the part of the defendant, contended, in terms, that deer kept in a legal park can in no case be deemed to have been tamed or reclaimed, although the argument seemed to bear that aspect; but the many cases to be found in the books in which the question has been agitated, in whom the property was of deer in a park, seem quite inconsistent with such a position; because in all such cases the arguments proceeded upon the distinct fact that the deer were in a park, that is, a legal park; and the question was whether deer continued to be wild animals, in which no property could be acquired, and which, therefore, like other game and wild animals, being upon the land, passed with the estate, or whether, by reason of their being tamed and reclaimed, a property could be acquired in the deer distinct from the

estate, although remaining in the park, and which would pass in like manner as other personal property.

The general position, therefore, to be found in all the books, that deer in a park will pass to the heir unless tamed and reclaimed, in which case they would pass to the executor, seems to be inconsistent with the position that deer can not, in any case, be considered as tamed and reclaimed whilst they continue in a legal park. Many authorities are cited upon that subject, the names of which it is not necessary to advert to.

The observations made in support of the rule, on the part of the defendant, were rather addressed to a complaint that the learned judge did not give so much weight to the fact of this being a legal park as they thought belonged to it, than to any exception to what the judge really said upon the subject. There can be no doubt that the learned counsel on the part of the defendant did not omit to impress upon the jury his view of the importance of the fact of the deer being found in an ancient and legal park; and nothing is stated to have fallen from the judge calculated to withdraw the attention of the jury from the observations of the counsel made in that respect, or to diminish the force which justly attaches to any of them.

It remains to be considered whether the arguments in support of the rule have shown that the verdict upon the issue, whether the deer were tame and reclaimed, was warranted by the evidence. In showing cause, on the part of the plaintiff, against the rule, it was contended that the conclusion of the jury, that Eridge Park continued to possess all the incidents of a legal park, was not warranted by the evidence; because it was said that the franchise had been forfeited by the addition of other lands to the ancient park, and the destruction of the means of ascertaining the ancient boundaries; and numerous authorities were referred to, relating to the requisites for constituting an existing legal park, and of the causes of the forfeiture of the franchise. But the opinion which the court has formed upon the other parts of the case, renders it unnecessary to enter into the consideration of that question, or into an examination of the authorities referred to.

That it was proper to leave the question to the jury in the terms in which the issue is expressly joined can not be disputed, and the direction that that question must be determined by referring to the place in which the deer were kept, to the nature and habits of the animals, and to the mode in which they were treated, appears to the court to be a correct direction; and it seems difficult to ascertain by what other means the question should be determined, whether the evidence in this case was such as to warrant a conclusion that the deer were tamed and reclaimed.

The court is, therefore, of opinion that the rule can not be supported on the ground of misdirection.

It is not contended that there was no evidence fit to be submitted to the jury, and that, therefore, the plaintiff ought to have been nonsuited; but it is said that the weight of evidence was against the verdict.

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies v. Powell*, are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times from that which anciently prevailed, as pointed out by Lord Chief Justice Willes, can not be overlooked. It is truly stated that ornament and profit are the sole ob-

jects for which deer are now ordinarily kept, whether in ancient legal parks or in modern inclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And, in this case, the evidence before adverted to was that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed, with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, as it is said, individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and in this case, the court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the court can not perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence, and do not feel authorized to disturb the verdict; and the rule for a new trial must, therefore, be discharged. Rule discharged.

[John Davies v. Thomas Powell and six others. Willes's Reports, 1737-1758.]

The following opinion of the court was thus given by Willes, Lord Chief Justice:

Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing 600 acres of land, in the parish of Caversham in the county of Oxford, for treading down the grass, and for chasing taking and carrying away *diversas feras, videlicet*, 100 bucks 100 does and 60 fawns of the value of £600 of the said plaintiff *inclusas et coarctatas* in the said close of the said plaintiff. Damage £700.

The defendants all join in the same plea; and as to the force and arms, etc. they plead not guilty, but as to the residue of the trespass they justify as servants of Charles Lord Cadogan, and set forth that the place where, etc., at the time when, etc., was, and is a park inclosed and fenced with pales and rails, called and known by the name of Caversham Park, etc.; and that the said Lord Cadogan was seized thereof and also of a messuage, etc., in his demesne as of fee, and being so seized on the 3d of August, 1730, by indenture demised the same to the plaintiff by the name (*inter alia*) of all the said park called Caversham Park from Lady-day then last past for the term of 7 years, under the rent of £124 2s. The deer are not particularly demised, but there is a covenant that the plaintiff, his executors, and administrators should from time to time during the term keep the full number of 100 living deer in and upon the said demised premises, or in or upon some parts thereof. And Lord Cadogan covenants to allow the plaintiff in the winter yearly during the term twenty loads of boughs and lops of trees for browse for *his deer* to feed on, calling them there, as he does in other parts of the lease, the deer of the said John Davies; and likewise covenants that if the plaintiff shall on the feast of St. Michael next before the expiration thereof pay Lord Cadogan all the rent that

would be due at the expiration of the lease, then the plaintiff, his executors, etc., might sell or dispose of any or all of the deer that he or they should have in the said park at any time in the last year of the said term, anything in the said indenture to the contrary in anywise notwithstanding. And the defendants justify taking the said deer as a distress for £186 rent due at St. Thomas-day, 1731, and say that they did seize, chase, and drive away the said deer in the declaration mentioned then and there found, "being the property of and belonging to the said John Davies," in the name of a distress for the said rent; and then set forth that they complied with the several requisites directed by the act concerning distresses (and to which there is no objection taken) that the deer were appraised at £161 15s. 6d., and that they were afterwards sold for £86 19s., being the best price they could get for the same; and that the said sum was paid to Lord Cadogan towards satisfaction of the rent in arrear; and that in taking such distress they did as little damage as they could.

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

And the single question that was submitted to the judgment of the court is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted for the plaintiff that they were not;

(1) Because they were *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because, if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

First. To support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited Finch 176; Bro. Abr., tit. "Property," pl 20; Keilway, 30 b; Co. Lit. 47 a; 1 Rol. Abr. 666; and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of Mallocke v. Eastley, 3 Lev. 227, where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 Inst. 109, 110, and 1 Hawk. P. C. 94 to prove that it is not felony to take away deer, conies, etc., unless tame and reclaimed.

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of swans, (7 Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren, etc. But there are writs in the register (fol. 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 102 is "*quare clausum ipsius A. freget et intravit, & cuniculos suos cepit.*"

The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general, for the rule in Co. Lit. is extended to dogs, yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great

damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

And that this is the case of the deer which are distrained in the present case is admitted in the pleadings. The plaintiff by bringing an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be *inclusas et coarctatas* in his close, which at least gave him a property *ratione loci*; and they are laid to be taken and distrained there; but what follows makes it still stronger, for in the demise set forth in the plea, and on which the question depends, they are several times called *the deer of John Davies, the plaintiff*, and he is at liberty to dispose of them as his own before the expiration of the term on the condition there mentioned. And it is expressly said that the defendants distrained the deer being the property of the said John Davies; it is also plain that he had a valuable property in them, they having been sold for £86 19s. both which facts are admitted by the demurrer. The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value. Besides it is expressly said in Bro. Abr., tit. "Property," pl. 44, and agreed in all the books, that if deer or any other things *feræ naturæ* become tame a man may have a property in them. And if a man steal such deer it is certainly felony, as is admitted in 3 Inst., 110, and Hawk P. C., in the place before cited.

Upon a supposition, therefore, which I do not admit to be law now, that a man can have no property in any but tame deer, these must be taken to be tame deer, because it is admitted that the plaintiff had a property in them.

Second. As to their not being chattels but hereditaments and incident to the park and so not distrainable, several cases were cited: Co. Lit., 47 b. and 7 Co. 17 b.; where it is said that if the owner of a park die the deer shall go to his heir and not to his executors; and the statute of Marlbridge (52 Hen. III, c. 22), where it is said that no one shall distrain his tenants *de libero tenemento suo nec de aliquibus ad liberum tenementum spectantibus*. I do admit the rule that hereditaments or things annexed to the freehold are not distrainable; and possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park; but it does not appear that this is such a park, nay it must be taken not to be so. In the declaration it is stiled *the close of the plaintiff*, called Caversham Park. In the plea indeed it is stiled a *park*, called Caversham Park; but it is not said that it is a park either by grant or prescription; and it can not be taken to be so on these pleadings, but must be taken to be a close where deer have been kept, and which therefore has obtained *the name of a park*, because the deer, as I mentioned before, are called *the deer of John Davies*, and because he is at liberty to sell them, and so to sever them from the park before the expiration of the term. And in Hale's History of the Pleas of the Crown (1 vol. fol. 491), cited for the defendants, it is expressly said that there may be a *park in reputation*, "as if a man inclose a piece of ground and put deer in it, but that makes it not a

park, without a prescription time out of mind or the King's charter." (Vid. stat., 21 Ed. I, *de malefactoribus in parvis* there referred to).

Third. As to the third objection that the deer are part of the thing demised, and consequently not distrainable, the only case which was cited to prove this was the case of tithes, which is nothing to the purpose; because where tithes only are let a man can not reserve a rent, it being only a personal contract. Without denying the rule, which I believe is generally true, the fact here will not warrant it, for they are not part of the thing demised. They are not mentioned in the description of the particulars, and can not be part of the thing demised for the reason before given, because they may be sold and disposed of by the plaintiff before the expiration of the demise.

Fourth. The last argument, drawn *ab inusitato*, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom.

Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining anything with respect to deer in forests and chases or parks properly so called, concerning which we do not think it necessary to determine anything at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear to have been kept at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear.

There must therefore be judgment for the defendants.

II.—THE RIGHT OF THE UNITED STATES TO PROTECT THEIR SEALING INTERESTS AND INDUSTRY.

The principal question which the United States Government conceives to be presented for the decision of this High Tribunal, is thus stated in the Case of the United States (p. 299):

Whether individuals, not subjects of the United States, have a right as against that Government and to which it must submit, to engage in the devastation complained of, which it forbids to its own citizens, and which must result in the speedy destruction of the entire property, industry, and interests involved in the preservation of the seal herd.

In reply on its part to this question, three propositions of law are set forth by the United States Government in its Case (p. 300):

First. That in view of the facts and circumstances established by the evidence, it has such a property in the Alaskan seal herd, as the natural product of its soil, made chiefly available by its protection and expenditure, highly valuable to its people, and a considerable source of public revenue, as entitles it to preserve the herd from destruction in the manner complained of, by an employment of such reasonable force as may be necessary.

Second. That, irrespective of the distinct right of property in the seal herd, the United States Government has for itself and for its people, an interest, an industry, and a commerce derived from the legitimate and proper use of the produce of the seal herd on its territory, which it is entitled, upon all principles applicable to the case, to protect against wanton destruction by individuals, for the sake of the small and casual profits in that way to be gained; and that no part of the high sea is or ought to be open to individuals, for the purpose of accomplishing the destruction of national interests of such a character and importance.

Third. That the United States, possessing as they alone possess, the power of preserving and cherishing this valuable interest, are in a most just sense the trustee thereof for the benefit of mankind, and should be permitted to discharge their trust without hindrance.

In the division of the argument that has been made between counsel for convenience' sake, the first and third of these propositions, which are naturally connected, have been exhaustively discussed by Mr. Carter.

Before proceeding to that consideration of the second proposition which is the principal purpose of this argument, the undersigned desires to add in respect to the first, some brief suggestions, which are perhaps only a restatement in a different form, of what has been already advanced.

Whatever else is in dispute, certain facts in relation to the seal herd, its qualities, and its necessities, are not denied.

The seal is an amphibious animal, polygamous, altogether *sui generis*, and very peculiar in its habits. A fixed home upon land during several months in the year is necessary to its reproduction, and to the perpetuation of its species. It has established this home, from the earliest known period of its existence, on the Pribilof Islands, to which it returns annually with an unfailing *animus revertendi* and an irresistible instinct, and where it remains during several months, and until the young which are born there have acquired sufficient growth and strength to depart on their periodic and regular migration.

While on land it submits readily to the control of man, and indeed commits itself to his protection. And it is testified by credible witnesses that every seal in the herd, were it desired, could be branded with the mark of the United States.

The Government has fostered and protected the seals, as did the Russian Government, its predecessor in the ownership of these islands, by careful legislation and by constant and salutary executive control, and has established out of the seal products an important and valuable industry. Without this protection the animal would long since have been exterminated, as it has been almost everywhere else.

When the female seals arrive on the islands, they are pregnant with the young which were begotten there during the previous season. After the young are born, the mothers, while suckling them, are accustomed almost daily, and from necessity, to run out to sea beyond the limits of the territorial waters in pursuit of food, leaving the young on the islands during their absence.

Upon these facts alone, it is insisted by the United States Government, that it has such a property in the seal herd, the produce of its territory and appurtenant thereto, as entitles that Government to protect it from extermination or other unauthorized and injurious interference.

The complete right of property in the Government while the animals are upon the shore or within the cannon-shot range which marks the limit of territorial waters can not be denied. The only question is whether it has such a right outside of that line, while the seals are on their way to the islands in the regular progress of their migration at the season of reproduction, or when, while remaining on the islands, the females are passing to and fro in the open sea in quest of the food necessary to sustain the young left there, and which would perish if their mothers were destroyed. The clear statement of this question and of the facts upon which it depends, would seem to render its answer obvious.

(1) Even upon the ordinary principles of municipal law as administered in courts of justice, such a property would exist under the circumstances stated. It is a general rule, long settled in the common law of England and America, that where useful animals, naturally, wild have become by their own act, or by the act of those who have subjected them to control, established in a home upon the land of such persons, to which the animals have an *animus revertendi* or fixed habit of return, and do therefore regularly return, where they are nurtured, protected, and made valuable by industry and expenditure, a title arises in the proprietors of the land, which enables them to prevent the destruction of the animals while temporarily absent from the territory where they belong; a title, however, which would be lost should they abandon permanently their habit of return, and regain their former wild state.

It is under this rule, the justice of which is apparent, that property is admitted in bees, in swans and wild geese, in pigeons, in deer, and in many other animals originally *feræ naturæ*, but yet capable of being partially subjected to the control of man, as is fully shown by the numerous authorities cited in and appended to Mr. Carter's argument; and that point need not be further elaborated.¹ The case of the seals is much stronger, in consequence of their peculiar nature and habits of life. Their home on American soil is not only of their own selection, but is a permanent home, necessary to their existence, and in respect to which they never lose the *animus revertendi*. Upon the evidence in

¹ See also the cases of *Hannam v. Mockett*, 2 Barnwell v. Cresswell's, Rep., p. 943; *Keeble v. Hicheringill*, Holt's Rep., p. 17, and *Carrington v. Taylor*, 1 East's Rep., p. 571, and Reporter's note, from which extracts are given in appendix to this portion of the argument, p. 180.

this case it is gravely to be doubted, whether if the United States Government should now repel them from the Pribylof Islands, and prevent henceforth their landing there as they are accustomed to do, there is any other land in those seas, affording the requisite qualities of soil, climate, atmosphere, approach, propinquity to the water, food, and freedom from disturbance, on which they would be able to reëstablish themselves, so as to continue their existence.

Especially does the rule of law above stated apply to animals, which in their temporary departure from their accustomed home, enter upon no other jurisdiction, and derive neither sustenance nor protection from any other proprietor, but only pass through the waters of the common highway of nations, where all rights are relative.

(2) But upon the broader principles of international law applicable to the case, the right of property in these seals in the United States Government becomes still clearer. Where animals of any sort, wild in their original nature, are attached and become appurtenant to a maritime territory, are not inexhaustible in their product, are made the basis of an important industry on such territory, and would be exterminated if thrown open to the general and unrestricted pursuit of mankind, they become the just property of the nation to which they are so attached, and from which they derive the protection without which they would cease to exist, even though in the habits or necessities of their life some of them pass from time to time into the adjacent sea, beyond those limits which by common consent and for the purposes of defense, are regarded as constituting a part of the national territory. In such a case as this, the herd and the industry arising out of it become indivisible, and constitute but one proprietorship.

While the United States Government asserts and stands upon the full claim of property in the seals which we have attempted to establish, it is still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case. The question here is not what is the right of ownership in an individual seal, should it wander in some other period into some other and far distant sea; that is an inquiry not essential to be gone into; but what is the right of property in the herd as a whole, in the seas, and under the circumstances, in which it is thus availed of by the United States Government as the foundation of an important national concern, and in

which it is assailed by the Canadians in the manner complained of? When this point is determined, all the dispute that has arisen in this case is disposed of.

The principle of law last stated is not only asserted, without contradiction, by the authoritative writers upon international jurisprudence, but has been acted upon, with the assent of all nations, in every case that has arisen in civilized times, within the conditions above stated. And upon that tenure is held and controlled to-day, by nations whose borders are upon the sea, all similar property, of many descriptions, that under like circumstances is known to exist.

Says Puffendorf (*Law of Nature and Nations*, book 4, chap. 5, sec. 7):

As for fishing, though it hath much more abundant subject in the sea than in lakes or rivers, yet 'tis manifest that it may in part be exhausted, and that if all nations should desire such right and liberty near the coast of any particular country, that country must be very much prejudiced in this respect; especially since 'tis very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent. In this case there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea than those who are seated at a distance from it.

Says Vattel (*Book 1, chap. 23, sec. 287, p. 126*):

The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc.; now in all these respects its use is not inexhaustible. Wherefore, the nation to whom the coasts belong may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possess themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive, in case there be a sufficient abundance of fish to furnish the neighboring nations? * * * (*Sec. 288.*) A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right.

Another suggestion is pertinent to the question.

The whole herd owes its existence, not merely to the care and protection, but to the forbearance of the United States Government within its

exclusive jurisdiction. While the seals are upon United States territory during the season of reproduction and nurture, that Government might easily destroy the herd by killing them all, at a considerable immediate profit. From such a slaughter it is not bound to refrain, if the only object is to preserve the animals long enough to enable them to be exterminated by foreigners at sea. If that is to be the result, it would be for the interest of the Government and plainly within its right and powers, to avail itself at once of such present value as its property possesses, if the future product of it can not be preserved. Can there be more conclusive proof than this of such lawful possession and control as constitutes property, and alone produces and continues the existence of the subject of it?

The justice and propriety of these propositions, their necessity to the general interests of mankind, and the foundation upon which they rest in the original principles from which rights of ownership are derived, have been clearly and forcibly pointed out by Mr. Carter.

In a later part of this argument (pp. 164-169) many instances, past and present, in respect to many descriptions of marine and submarine property, from many nations, and from Great Britain and its colonies especially, are gathered together to show what the usage of mankind on this subject has been and is. It is that general usage which constitutes the law of this case. And on this point, if it can be shown that any different usage has ever prevailed in the case of any nation able to assert its independence, touching any similar property on which it set value, let such evidence be produced by those who are able to find it, and whose claims it will subserve. If in this instance the United States Government has no right of property which it is entitled to protect, the case would present the singular anomaly of being the only one in which that right has not been maintained, in respect to any valuable marine product similarly situated, or appurtenant in like manner to the territory of a maritime country.

It is against this view of the case, too obvious to escape the attention of the distinguished counsel for Her Majesty's Government, that they have chiefly struggled throughout the British Counter Case, for which they have thought it right to reserve their contentions, both in propositions and evidence, in respect to the principal questions involved. But they have struggled in vain. The broad facts upon which it rests are either admitted or are incontestable. No mere attempt to disparage or diminish them, no cavil over details, no conjectural suggestions

unsustained by proof, can break their force or change their effect. And the legal conclusions to which they conduct, can not be regarded at this day as open to serious question.

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.

The question then remains, whether upon that hypothesis, the industry established and maintained by the United States Government on the Pribilof Islands, in the taking of the seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada, by a method of pursuit outside the ordinary line of territorial jurisdiction, which must result in the extermination of the animals. Is there, even in that view of the case, any principle of international law which deprives the United States Government of the right to defend itself against this destruction of its unquestioned interests, planted and established on its own territory? In other words, is the right of individual citizens of another country to the temporary profit to be derived out of such extermination, superior on the high sea to that of the United States Government to protect itself against the consequences.

This, if the strict right of property can be successfully denied, is the precise question addressed to the consideration of the Tribunal. Abstract speculations can only be useful, so far as they tend to conduct to a just determination of it.

Before proceeding to a discussion of this question, the material facts and conditions upon which it arises should be clearly perceived and understood. For it is upon these and not upon theoretical considerations that the argument reposes.

(1) It is to be observed in the first place, that the interest in the business which it is sought to protect, is an important interest and resource of the Government itself.

The seal industry on these islands was one of the principal inducements to the purchase of Alaska by the United States from the Rus-

sian Government, for a large sum of money. The care and pursuit of the seals were immediately made the subject of legislation by Congress, under which the whole business has been since regulated, protected, and carried on by the Government, as it had been before by Russia, in such manner as to preserve the existence and to increase the numbers of the seal herd, and to make its product valuable to those engaged in it, and a source of a considerable public revenue to the Government. (See U. S. Revised Statutes, secs. 1956-1975.)

It pays to the Government, as the evidence shows, a direct revenue of about \$10 per skin, and a considerable indirect revenue upon the importation of the dressed furs; and to the company, which under lease from the Government and subject to its regulations carries on the business, it affords a large annual return, which enables them to make their payments to the Government. To the inhabitants of the islands and many others directly employed or indirectly concerned, it gives the means of subsistence.

Nor are the United States alone the recipients of the profits, or interested to preserve this industry. The principal manufacture of merchantable furs from the raw skins is carried on in London, where large houses are engaged in it, employing as the proof shows, between 2,000 and 3,000 persons. London is also the headquarters of the trade in the product, and of the commerce through which it is distributed. It is probable that the interest of Great Britain in the preservation of the seal herd is almost as great as that of the United States.

The civilized world outside of these two countries is likewise concerned in preserving from extinction the valuable product of these islands. It enters largely into human use; there is no substitute for it, especially in view of the great decrease of fur-bearing animals; and nowhere else on the globe is the seal fur produced in any considerable quantities. Almost everywhere this valuable animal has been exterminated, by the same reckless and wasteful pursuit that is complained of here.

It is pertinent to remember, in this connection, that if the nation that is contending for the preservation of this product of its territory was but small and poor, and this resource for revenue and subsistence, instead of being one out of many, were the only one it possessed, so that its very existence depended upon the maintenance of it, the principles of international law applicable to the subject would be precisely the same as they are now. The case would be relatively of greater im-

portance to one of the parties; the law that would control it would be the law that controls this case; for a nation has the same right to defend one material interest, or one class of citizens, that it has to defend all it possesses, and all the conditions of its existence.

(2) The pursuit of the seals in the open sea, at the times and in the manner complained of, leads to the early extermination of the whole herd.

It is not necessary to the argument that this extreme result should be made out. It would be enough to show that the interest in question is seriously embarrassed and prejudiced, or its product materially reduced, even though it were not altogether destroyed. But the evidence in the case, of which a large amount has been submitted, completely establishes the fact that the herd has by these means been already largely diminished, and that it must necessarily, if the same conduct is continued, be at no distant day entirely annihilated.

(3) The method of pursuit employed by the Canadian vessels, and against which the United States Government protests, not only tends to the rapid extermination of the seal, but is in itself barbarous, inhuman, and wasteful.

A very large proportion of the seals taken are females, either pregnant and about to give birth to their young, or engaged in suckling their offspring, which, by the killing of the mothers, are left to perish in great numbers by starvation. Some are in both these conditions at the same time. And of those thus destroyed in the water, a considerable share certainly, and probably a very large share, are lost to the hunter.

The killing of female seals at any time is made criminal by the statutes of the United States. (U. S. Revised Statutes, sec. 1961).

The destruction during the breeding season of wild animals of any kind which are in any respect useful to man, is prohibited, not only by all the instincts of humanity, but by the laws of every civilized country, and especially by the laws of the United States and of Great Britain. That protection, as will be more fully pointed out hereafter, has long been and now is extended to the seals in every country in the world where they are to be found. In no part of the world that is within territorial jurisdiction could such conduct take place, without exposing the perpetrator to criminal prosecution (see Case of the United States, pp. 220-229). So that in order to justify it in this case, the sea must be held to be free for acts which are not only destructive of the valuable interests of an adjacent nation, but are forbidden everywhere else by universal law.

(4) The depredations in question, dignified in the Report of the British Commissioners by the name of an "industry," are the work of individuals who fit out vessels for this purpose. Their number, though increasing, is not great. The business is speculative, and as a whole not remunerative, though it has instances of large gains which stimulate the enterprise of those concerned, and make the prospect attractive, like all occupations which have a touch of adventure, an element of gambling, and a taste of cruelty.

It is this casual and uncertain profit, of these comparatively few individuals, which must of course terminate when the seal herd is destroyed or even much reduced, that is to be balanced against the loss that will be sustained by the United States, if that destruction is completed.

(5) Against this injury, which the United States Government has made the subject of vain remonstrance, there are absolutely no means of defense that can be made available within the limits of territorial jurisdiction. The destruction is wrought outside those limits, and must be repressed there or it can not be repressed at all.

As it is impossible, when seals are hunted in the water, that the sex can ever be discriminated before the killing takes place, it follows that if what is called "pelagic sealing" is allowed to be carried on, the enormous proportion of pregnant and suckling females and of nursing young before referred to, must continue to be destroyed.

That method of pursuit conduces also unavoidably to injurious raids by those concerned in it, upon the seals on the islands. The extent of the shores and the peculiarity of the climate and atmosphere, as described in the evidence, make it extremely difficult and at times impossible to maintain such vigilance as will prevent these incursions, if seal-hunting in the neighboring waters is permitted. The result of these raids is suggested in the British Counter Case as one of the means by which the gradual extermination of the seals, too obvious to be denied, is taking place. How much the suggestion is worth, will be seen when the whole evidence is reviewed. But the counsel seem to forget, in making it, that it is only the toleration of foreign sealing vessels in waters near the islands, that renders such raids possible.

The inevitable conclusion from these facts is, that there is an absolute necessity for the repression of killing seals in the water in the seas near the Pribilof Islands, if the herd is to be preserved from extinction. No middle course is practicable consistently with its preservation.

The evidence adduced on the part of the United States in support of the foregoing propositions of fact, and that relied upon to the contrary, so far as we have had an opportunity to see it, is fully discussed in a later branch of the argument (*infra*, pp. 228-313).

The ground upon which the destruction of the seal is sought to be justified, is that the open sea is free; and that since this slaughter takes place there, it is done in the exercise of an indefeasible right in the individuals engaged in it; that the nation injured can not defend itself on the sea, and therefore upon the circumstances of this case can not defend itself at all, let the consequences be what they may.

The United States Government denies this proposition. While conceding and interested to maintain the general rule of the freedom of the sea, as established by modern usage and *consensus* of opinion, it asserts that the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it; that to the invasion of such interests, for the purposes of private gain, it is not free; that the right of self-defense on the part of a nation is a perfect and paramount right, to which all others are subordinate, and which upon no admitted theory of international law has ever been surrendered; that it extends to all the material interests of a nation important to be defended; that in the time, the place, the manner, and the extent of its execution, it is limited only by the actual necessity of the particular case; that it may, therefore, be exercised upon the high sea, as well as upon the land, and even upon the territory of other and friendly nations, provided only that the necessity for it plainly appears; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, even though such act would be otherwise justifiable, the right of the individual must give way, and the nation will be entitled to protect itself against the injury, by whatever force may be reasonably necessary, according to the usages established in analogous cases.

It is believed that these general principles will be found to underlie the whole theory and system of the law of the sea, so far as it has been formulated by the consent and usage of mankind; that they are the foundation of many maritime rights, long recognized and established; that they have received the sanction of courts of justice whenever they have been brought under judicial consideration, and of all writers upon the subject whose views are entitled to weight; that they are supported

When commerce became more extensive and better able to protect itself, the modern conception of the freedom of the sea, first formally set forth by Grotius, came gradually to be established. But the contrary doctrine was contended for by the great judicial authorities in England. The views of Sir Matthew Hale and of Selden are well known. The powerful argument of the latter is a permanent monument of the contention of his time in England. The opinion of Blackstone was to the same effect. As late as 1824 another eminent English writer, Mr. Chitty, in his Commercial Law, maintained the right of dominion by maritime nations over neighboring seas, founded upon the necessities of their situation. The surrender by England and other maritime powers of their control over the seas, so long maintained, in deference to the growing sentiment of the world and the demands of free commerce, was slowly and reluctantly given. But that surrender was, as universally understood, for the purposes of just, innocent, and mutually profitable use by the nations whose borders touched the sea. It was not thrown open again to general lawlessness. The whole argument in favor of the freedom of the sea was based upon the ground that its free use by mankind was inoffensive and harmless and conductive to the general good; and, therefore, ought not to be arbitrarily restricted.¹

Says Mr. Justice Story:

Every ship sails there [in the open sea] with the unquestionable right of pursuing her own lawful business without interruption, but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is *sic utere tuo ut alienum non ledas*. (The Marianna Flora, 11 Wheaton's Repts., U. S. Sup. Court, p. 41.)

of maritime jurisdiction was reversed—from *mare clausum* to *mare liberum*; and the sovereignty allowed by international law over a portion of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean" (p. 77).

¹Grotius (Book II, chap. III, sec. 12, p. 445) remarks: "It is certain that he who would take possession of the sea by occupation could not prevent a *peaceful and innocent navigation*, since such a transit can not be interdicted even on land, though ordinarily it would be less necessary and more dangerous."

And Mr. Twiss (Int. Law, secs. 172, 185) says: "But this is not the case with the open sea, upon which all persons may navigate without the least prejudice to any nation whatever, and without exposing any nation thereby to danger. It would *thus seem* that there is no natural warrant for any nation to seek to take possession of the open sea, or even to restrict the innocent use of it by other nations. * * * The right of fishing in the open sea or main ocean is common to all nations on the same principle which sanctions a common right of navigation, viz, *that he who fishes in the open sea does no injury to any one, and the products of the sea are, in this respect, inexhaustible and sufficient for all.*"

Says Chancellor Kent (*1 Commentaries*, 27):

Every vessel in time of peace has a right to consult its own safety and convenience, and to pursue its own course and business without being disturbed, *when it does not violate the rights of others.*

The freedom of the high seas for the *inoffensive* navigation of all nations is firmly established. (Amphlett, J., *Queen v. Kehn*, 2 Law Rep. Exch. Div., p. 119.)

Nor was the right of self-defense on the sea ever yielded up or relinquished by any nation. On the contrary, in every successive instance in the progress of civilization and the advance of commerce, in which restrictions upon the freedom of the sea were found necessary to the protection of any material interest or right, general or special, such restrictions were at once asserted, were recognized by general assent, and became incorporated into the growth of that system of rules and usages known as international law. Some of them will be more particularly adverted to hereafter. The safety of states and the protection of their commercial interests were not sacrificed to the idea of the freedom of the sea. That freedom was conceded for the purposes of such protection, and as affording its best security.

There are no arbitrary restrictions imposed in modern times upon the freedom of the sea. Neither are there any arbitrary rights there. There, as elsewhere, liberty has two conditions; submission to just principles of law, and due regard for the rights of others. And these conditions are enforced by the injured party, because they can be enforced in no other way.¹

¹ "Since, then, a nation is obliged to preserve itself, it has a right to everything necessary for its preservation, for the law of nature gives us a right to everything without which we can not fulfill our obligations.

"A nation or state has a right to everything that can help to ward off imminent danger and to keep at a distance whatever is capable of causing its ruin, and that from the very same reasons that establish its right to things necessary to its preservation." (Vattel, secs. 18, 19.)

"The right of self-defense is, accordingly, a primary right of nations, and it may be exercised, either by way of resistance to an immediate assault or by way of precaution against threatened aggression. The indefeasible right of every nation to provide for its own defense is classed by Vattel among its perfect rights." (Twiss, *Int. Law*, part I, sec. 12.)

"The right of self-preservation is the first law of nations, as it is of individuals."
* * * "For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability." (Phillimore, *Int. Law*, chap. 10, secs. 111, 114.)

"In the last resort almost the whole of the duties of states are subordinated to the right of self-protection. Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary. * * * There are, however, circumstances falling short of occasions upon which existence is immediately in question, in which,

The right of self-defense by a nation upon the sea, and the right of municipal jurisdiction over a limited part of the sea adjacent to the coast, are not to be confounded, for the two are totally distinct. The littoral jurisdiction, indeed, is only a branch of the general right of self-defense, accorded by usage and common consent: first, because it is always necessary for self-protection, and next, because it is usually sufficient for it. Upon no other ground was it ever attempted to be sustained. That jurisdiction must be limited by an ascertained or ascertainable line, is its necessary condition. That the right of self-defense is subject to no territorial line, is equally plain. All rights of self-defense are the result of necessity. They are co-extensive with the necessity that gives rise to them, and can be restricted by no other boundary. As remarked by Chief Justice Marshall, "All that is necessary to this object is lawful, all that transcends it is unlawful."

Precisely what is the limit of jurisdiction upon the littoral sea, and precisely what are the nature and extent of the jurisdiction that can be asserted within it, whether it is absolute or qualified, territorial or extraterritorial, are questions that have been the subject of grave difference of opinion among jurists. Nor have they ever been entirely settled. They will be found to be discussed with a fullness of learning, a depth of research, and a masterly power of reasoning, to which nothing can be added, in the opinions of the English judges in the important and leading case of *The Queen v. Kohn* (2 Law Rep. Exch. Div., 1876-'77, pp. 63 to 239). These learned and eminent judges were not fortunate enough to agree upon all the questions involved, and every view that can be taken of them, and every consideration that is pertinent, are exhaustively presented in their opinions.

Upon these vexed questions it is not at all necessary to enter in the present case, for they have little to do with it. Whether the conclu-

through a sort of extension of the idea of self-preservation to include self-protection against serious hurts, states are allowed to disregard certain of the ordinary rules of law, in the same manner as if their existence were involved." (Hall, *Int. Law*, chap. 7, sec. 83.)

"If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss even of one of its members weakens it and is injurious to its preservation. It owes this also to the members in particular, in consequence of the very act of association; for those who compose a nation are united for their defense and common advantage, and none can justly be deprived of this union and of the advantages he expects to derive from it, while he, on his side, fulfills the conditions. The body of a nation can not, then, abandon a province, a town, or even a single individual who is a part of it, unless compelled to it by necessity or indispensably obliged to it by the strongest reasons founded on the public safety." (Vattel, sec. 17.)

sions of one or the other of these conflicting opinions are to be accepted, is immaterial here. All authorities agree that the sole reason upon which a certain right of jurisdiction upon the sea, and within a limit that is variously stated, has been conceded to maritime nations, is found in the necessities of self-defense. This part of the dominion over the sea, whether it be greater or less, has never been surrendered. It is a remnant of the former more extended dominion, retained for the same reason for which that was asserted. Lord Chief Justice Cockburn, in his opinion in the case just cited, reviews the history of this subject, quoting the language of every previous writer of repute, and referring to every judicial decision respecting it which then existed. He points out very clearly the different views that have prevailed and which then prevailed as to the nature of the jurisdiction, and as to the distance over which it could be extended. This limit has been variously asserted by writers of distinction and authority, at two days' sail, one hundred miles, sixty miles, the horizon line, as far as can be seen from the shore, as far as bottom can be found with the dead line, the range of a cannon shot, two leagues, one league, or so far as the Government might think necessary.¹

On the other point, the character of the jurisdiction, it may be assumed that by the controlling opinion of the present time, and by

¹The lord chief justice observes: "From the review of these authorities we arrive at the following results: There can be no doubt that the suggestion of Bynkershoek that the sea surrounding the coast to the extent of cannon range should be treated as belonging to the state owning the coast, has, with but very few exceptions, been accepted and adopted by the publicists who have followed him during the last two centuries. But it is equally clear in the practical application of the rule in the respect of the particular of distance, as also in the still more essential particular of the character of sovereignty and dominion to be exercised, great differences of opinion have prevailed and still continue to exist. As regards distance, while the majority of authors have adhered to the three-mile zone, others, like M. Ortolan and Mr. Halleck, applying with greater consistency the principle on which the whole doctrine rests, insist on extending the distance to the modern range of cannon—in other words, doubling it. This difference of opinion may be of little practical importance in the present circumstances, inasmuch as the place at which the offense occurred was within the lesser distance; but it is nevertheless not immaterial as showing how unsettled this doctrine still is. The question of sovereignty, on the other hand, is all important, and here we have every shade of opinion. * * * Looking at this we may properly ask those who contend for the application of the existing law to the littoral sea, independently of legislation, to tell us the extent to which we are to go in applying it. Are we to limit it to three miles, or to extend it to six? Are we to treat the whole body of the criminal law as applicable to it, or only so much as relates to police and safety? Or are we to limit it, as one of these authors proposes, to the protection of fisheries and customs, the exacting of harbor and like dues, and the protection of our coasts in time of war? Which of these writers are we to follow?"

the usage of nations, it is not regarded as so far absolute that a nation may exclude altogether from within the range of cannon shot the ships of another country, innocently navigating, and violating no reasonable regulation of the municipal law. But the power which may be exerted within that limit is only coextensive with the just requirements of the self protection for which it exists, although undoubtedly the nation exercising the jurisdiction must be allowed, so long as it acts in good faith, to be its own judge as to the regulations proper to be prescribed, and the manner of their enforcement.¹

This somewhat indefinite area of a greater or less jurisdiction over the marginal sea, which has thus come to be recognized and conceded, though accorded for the purposes of national self-protection, is by no means its boundary. It illustrates the right of which it is an example, but does not exhaust it. It is but one application of the principle out of many. The necessity which gave rise to it justifies likewise the larger power, and further means of defence, which may from time to time be required. No nation, in whatever statute or treaty it may have assented to the three-mile or cannon-shot limit of municipal jurisdiction, has ever agreed to surrender its right of self defense outside of that boundary, or to substitute for that right the contracted and qualified power which is only one of the results of it, and which must

¹Says Sir Robert Phillimore, in his opinion in *Queen v. Kohn*: "The sound conclusions which result from the investigation of the authorities which have been referred to appear to me to be these: The consensus of civilized independent states has recognized a maritime extension of frontier to the distance of three miles from low water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent state.

"It is for the attainment of these particular objects that a dominion has been granted over these portions of the high seas.

"This proposition is materially different from the proposition contended for, viz: that it is competent to a state to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

"According to modern international law it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

"In the former case there is no *jus transitus*; in the latter case there is.

"The reason of the thing is that the defence and security of the state does not require or warrant the exclusion of peaceable foreign vessels from passing over these waters, and the custom and usage of nations has not sanctioned it."

Lord Cockburn, in *Queen v. Kohn*, speaking of the claim that a nation has the right of excluding foreign ships from innocent passage within the three-mile limit, says it is a "doctrine too monstrous to be admitted." And again, "No nation has arrogated to itself the right of excluding foreign vessels from the use of the external littoral waters for the purpose of navigation."

often prove inadequate or inapplicable. On the contrary, as will be seen hereafter, many nations have been compelled to assert, and have successfully asserted, much wider and larger powers in the defence of their manifold interests.

It is under the operation of the same principle on which jurisdiction is awarded to nations over the sea within the 3-mile or cannon-shot limit, that a similar jurisdiction is allowed to be exercised not only over navigable rivers, bays, and estuaries, which may be fairly regarded as lying within territorial boundaries, but over those larger portions of the ocean comprised within lines drawn between distant promontories or headlands, and often extending much more than three miles from the nearest coast. Such waters were formerly known in English law as "the King's Chambers."¹

Chancellor Kent remarks on this subject (1 Com., pp. 30, 31):

Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi.

The principle on which this exercise of maritime jurisdiction reposes is only that of self-defense. As Chancellor Kent further observes (1 Com., p. 26):

Navigable rivers which flow through a territory, and the seacoast adjoining it * * * belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation and to the undisturbed use of the neighboring shores.

That the right of self-defence is not limited by any physical boundary, but may be exerted wherever and whenever necessity requires it, upon the high sea or even upon foreign territory, is not only the inevitable result of the application of just principles, but is established by the highest authorities in the law of nations.

¹Sir Henry Maine says (Lectures on International Law, p. 80): "Another survival of larger pretensions is the English claim to exclusive authority over what were called the King's Chambers. These are portions of the sea cut off by lines drawn from one promontory of our coast to another, as from Lands End to Milford Haven. The claim has been followed in America, and a jurisdiction of the like kind is asserted by the United States over Delaware Bay and other estuaries which enter into portions of their territory."

Vattel says upon this subject (p. 128, sec. 289):

It is not easy to determine to what distance the nation may extend its rights over the sea by which it is surrounded. * * * Each state may on this head make what regulation it pleases so far as respects the transactions of the citizens with each other, or their concerns with the sovereign; but, between nation and nation, all that can reasonably be said is that in general the dominion of the state over the neighboring seas extends as far as her safety renders it necessary, and her power is able to assert it.

Chancellor Kent observes (1 Com., p. 29):

It is difficult to draw any precise or determinate conclusion amidst the variety of opinions as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends. All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end.

And states may exercise a more qualified jurisdiction over the seas near their coast for more than the three (or five) mile limit for fiscal and defensive purposes. Both Great Britain and the United States have prohibited the transshipment within four leagues of their coast of foreign goods without payment of duties.¹ (Kent Com. I, p. 31.)

In the case of *Church v. Hubbard* (2 Cranch, Rep. 287), the Supreme Court of the United States unanimously held that "the right of a nation to seize vessels attempting an illicit trade is not confined to their harbors or to the range of their batteries." It appeared in that case that Portugal had prohibited trade with its colonies by foreigners. A

¹ Mr. Twiss says (vol. I, pp. 241, 242, Int. Law): "Further, if the free and common use of a thing which is incapable of being appropriated were likely to be prejudicial or dangerous to a nation, the care of its own safety would authorize it to reduce that thing under its exclusive empire if possible, in order to restrict the use of it on the part of others, by such precautions as prudence might dictate."

Wildman, on the same point, says (Int. Law, vol. I, p. 70): "The sea within gunshot of the shore is occupied by the occupation of the coast. Beyond this limit maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations had for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal and defensive regulations more immediately affecting their safety and welfare."

Creasy (Int. Law, sec. 245) remarks: "States may exercise a qualified jurisdiction over the seas near their coasts for more than the three (or five) miles limit, for fiscal and defensive purposes, that is, for the purpose of enforcement of their revenue laws, and in order to prevent foreign armed vessels from hovering on their coasts in a menacing and annoying manner."

And Halleck says (Int. Law, chap. 6, sec. 13) the three-mile belt is the subject of territorial jurisdiction. "Even beyond this limit states may exercise a qualified jurisdiction for fiscal and defensive purposes."

foreign vessel found to have been intending such trade was seized on the high seas, carried into a Portuguese port, and there condemned. And it was held that the seizure was legal, Chief Justice Marshall delivering the opinion of the court. He points out with great clearness the difference between the right of a nation to exercise jurisdiction, and its right of self-defense.¹

Lord Chief Justice Cockburn, in his opinion in the case of *Queen v. Kehn*, *supra*, cites this decision with approval, and quotes from the opinion. He says (2 Law Rep., 214):

Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first, the legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, viz, the right of the state to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws. This principle was well explained by Marshall, C. J., in the case of *Church v. Hubbard*.²

The opinion of Chief Justice Marshall and the language of Lord Cockburn, above cited, very clearly illustrate the distinction between a municipal statute and a defensive regulation. The one emanates from the legislative power, and has effect only within the territorial jurisdiction in which it is enacted, and upon those subject to that jurisdiction elsewhere. The other is the exertion of executive authority when necessary for the protection of the national interest, and may take place wherever that necessity exists. Statutes intended for such protection may, therefore, have effect as statutes within the jurisdiction, and as defensive regulations without it, if the Government choose so to enforce them, provided only that such enforcement is necessary for just defense, and that the regulations are reasonable for that purpose. (*Supra*, pp. 169-171).

Such was the view of the United States Supreme Court in the *Sayward Case*, in respect to the operation of the acts of Congress before referred to, for the protection of the seal in Bering Sea. In that case

¹For full quotations from this opinion, see Appendix to this argument, *infra*, p. 181.

²After quoting at large from Chief Justice Marshall's opinion, Lord Cockburn proceeds to say: "To this class of enactments belong the acts imposing penalties for the violation of neutrality and the so-called 'hovering acts' and acts relating to the customs. Thus, the foreign enlistment act (33 and 34 Vic. C. 90) which imposes penalties for various acts done in violation of neutral obligations, some of which are applicable to foreigners as well as to British subjects, is extended in S. 2 to all the dominions of Her Majesty, 'including the adjacent territorial waters.'"

a Canadian vessel had been captured on the high sea by a United States cruiser, and condemned by decree of the United States District court, for violation of the regulations prescribed in those acts; and it was claimed by the owners that the capture was unjustifiable, as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the court. But in the opinion it is intimated that if it had been necessary to decide the question the capture would have been regarded as an executive act in defense of national interests, and not as the enforcement of a statute beyond the limits of its effect. (Case of the *Sayward*, U. S. Sup. Ct. Rep., Book 36, U. S. Led., p. 179.

As such defensive regulations, if the United States Government thinks proper so to enforce them beyond the territorial line, the provisions of those acts of Congress fulfill the conditions of being both necessary and reasonable. They interfere in no respect with the freedom of the sea, except for the protection of the seal. And for the purposes of that protection they are not only such as the Government prescribes as against its own subjects, but are clearly shown by the evidence to be necessary to be so enforced, in order to prevent the extermination of the seals and its consequences to the United States.

The decision in *Church v. Hubbard* is cited as stating the law, by Chancellor Kent (1 Com., 31); and also by Mr. Wharton (Dig. Int. Law, p. 113) and by Wheaton (Int. Law, 6th ed., p. 235). It was followed in the same court by the case of *Hudson v. Guestier* (6 Cranch Rep., 281), in which it was held that the jurisdiction of the French court as to seizures is not confined to seizures made within two leagues of the coast. And that a seizure beyond the limits of the territorial jurisdiction for breach of a municipal regulation is warranted by the law of nations.

This decision overruled a previous case (*Rose v. Himely*, 4 Cranch Rep., 287) made, though upon very different facts, by a divided court. The dissenting opinion of Johnson, J., in that case, which by the subsequent decision became the law, is worthy of perusal.¹

Mr. Dana, who published an edition of Wheaton, with notes which so far as they were his own did not add to its value, is of opinion that in the decision in *Church v. Hubbard*, Chief Justice Marshall and his eminent associates were mistaken. And this remark of his is cited in the British Case. Mr. Dana has no such repute as makes him an

¹ For opinion see Appendix, *infra* p. 182.

authority, especially when he undertakes to overrule the greatest of American judges, and the repeated decisions of the Supreme Court of the United States. No other writer or judge, so far as we are aware, has ever shared his opinion. And, as has been seen, the decision of Chief Justice Marshall has received the approval of very great lawyers.

In the comments in his note upon these cases, Mr. Dana does not correctly state them. The decision in *Church v. Hubbard* was upon the unanimous opinion of the court, and has never been questioned except by him. The subsequent case of *Rose v. Himely* decided that the seizure of a vessel without the territorial domain of the sovereign under cover of whose authority it is made will not give jurisdiction to condemn the vessel, if it is never brought within the dominions of that sovereign. It would seem from some of the language of Chief Justice Marshall, that he *may* have been of opinion that the seizure itself was unwarranted, irrespective of the fact that the vessel never was brought in, though this is by no means clear. Judges Livingston, Cushing, and Chase concurred in the decision, on the sole ground that the captured ship was not brought into a port of the country to which the capturing vessel belonged; and declined to express an opinion as to the validity of the seizure upon the high sea, for breach of a municipal regulation, provided the vessel had been so brought in. While Judge Johnson dissented altogether, holding in the opinion above referred to, that the seizure was valid, although never brought in. Mr. Dana mistakes the case of *Rose v. Himely* in saying that it was there decided that a seizure of a vessel outside of the territorial jurisdiction is unwarranted. And he mistakes the case of *Hudson v. Gues-tier*, in which the contrary is distinctly held, Chief Justice Marshall concurring.

The cases of the *Marianna Flora* (11 Wheaton Rep. U. S. Sup. Court), above cited, in which the opinion was delivered by Mr. Justice Story, and the case of the Schooner *Betsey* (Mason's Rep. 354), a decision of Judge Story, were to the same effect.¹

¹In the recent case (1890) of *Manchester v. Massachusetts* (139 U. S. Supreme Court Rep., 240), the law on this subject was thus stated by Mr. Choate, of counsel: "Without these limits were the 'high seas,' the common property of all nations. Over these England, as one of the common sovereigns of the ocean, had certain rights of jurisdiction and dominion derived from and sanctioned by the agreement of nations expressed or implied.

"Such jurisdiction and dominion she had for all purposes of self-defense, and for the regulation of coast fisheries.

"The exercise of such rights over adjacent waters would not necessarily be limited

The Continental publicists are in full concurrence on this point with English and American authorities.¹

In respect to the exercise of the right of self-defense, not merely upon the high seas but in the territory or territorial waters of a foreign and friendly state, authority is equally strong. Says Mr. Wharton (1 Dig. of Int. Law., p. 50):

Intrusion on the territory or territorial waters of a foreign state is excusable when necessary for self-protection in matters of vital importance, and when no other mode of relief is attainable.

And (pp. 221, 222):

When there is no other way of warding off a perilous attack upon a country, the sovereign of such country can intervene by force in the territory from which the attack is threatened, in order to prevent such attack.

A belligerent may, under extreme necessity, enter neutral territory and do what is actually necessary for protection.

And he cites the case of Amelia Island, in respect to which he says:

Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who, in the name of the insurgent colonies of Buenos Ayres and Venezuela, preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President

to a 3-mile belt, but would undoubtedly be sanctioned as far as reasonably necessary to secure the practical benefits of their possession. If self-defense or regulation of fisheries should reasonably require assumption of control to a greater distance than 3 miles, it would undoubtedly be acquiesced in by other nations.

"The *marine league* distance has acquired prominence merely because of its adoption as a boundary in certain agreements and treaties, and from its frequent mention in text-books, but has never been established in law as a fixed boundary.

"These rights belonged to England as a member of the family of nations, and did not constitute her the possessor of a proprietary title in any part of the high seas nor add any portion of these waters to her realm. In their nature they were rights of dominion and sovereignty rather than of property."

Mr. Justice Blatchford, in delivering the opinion of the court, says: "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation, and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

¹For citations from Azuni, Plocque, La Four, Calvo, Heffter, Bluntschli, and Carnazza-Amari, see Appendix, *infra* pp. 183-186.

Monroe called his Cabinet together in October, 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.

In the case of the *Caroline*, in the year 1838, during the Canadian rebellion, a British armed force pursued that vessel into an American port on Lake Erie, cut her out and destroyed her by fire, killing one or more of her crew. This otherwise gross violation of the territory of a friendly nation was justified by the British Government as a necessary measure of self defense, since the *Caroline* had been engaged in carrying supplies to the insurgents. In the correspondence that ensued between the two governments, the British right to intrude as they did upon American territory was conceded by Mr. Webster, the American Secretary of State, provided the necessities of self-defense required it, and the only question made was whether the necessity for its exercise actually existed. In the end, that point seems to have been given up, and no reparation or apology was ever made. Though it is certainly difficult to see how any greater necessity was to be found in that case than may always be said to exist for attacking an enemy's ship, the case presents a very strong illustration of the application of an undoubted principle. A very interesting discussion of the question will be found in the correspondence.¹

Phillimore says of the *Caroline* case (vol. I, p. 255, sec. CCXVI):

The act was made the subject of complaint on the ground of violation of territory by the American Government, and vindicated by Great Britain on the ground of self-preservation; which, if her version of the facts were correct, was a sufficient answer and a complete vindication.

Hall (Int. Law, p. 267, par. 34) expresses similar views.

In 1815, under orders of Mr. Monroe, measures were taken for the destruction of a fort held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States. The governor of Pensacola had been called upon to repress the evil and punish the marauders, but he refused; and on his refusal the Spanish territory was entered, and the fort attacked and destroyed, on the ground of necessity.

A similar case was that of Greytown. It was a port on the Mosquito coast, in which some United States citizens resided. These citizens, and others interested with them in business, were subjected to gross indignities and injuries by the local authorities, who were British, but

¹ For correspondence between Mr. Webster and Lord Ashburton, and remarks of Mr. Calhoun and Lord Campbell, see Appendix, *infra*, p. 186.

who professed to act from the authority of the king or chief of the Mosquito Islands. The parties then appealed to the commander of the United States sloop of war *Cyane*, then lying near the port, for protection. To punish the authorities for their action he bombarded the town. For this act he was denounced by the British residents, who claimed that the British Government had a protectorate over that region. His action was sustained by the Government of the United States, the ground being the necessity of punishing in this way the wrong to citizens of the United States, and preventing its continuance. (1 Wharton's Dig., p. 229.)

When the sovereign of a territory permits it to be made the base of hostilities by outlaws and savages against a country with which such sovereign is at peace, the government of the latter country is entitled, as a matter of necessity, to pursue the assailants wherever they may be, and to take such measures as are necessary to put an end to their aggressions. (*Ib.*, p. 226.)

An incursion into the territory of Mexico for the purpose of dispersing a band of Indian marauders is, if necessary, not a violation of the law of nations. (*Ib.*, p. 233.)¹

In all these cases the discussion proceeded upon the question of the existence of the particular necessity. The right to enter upon neutral territory, if necessity really required it, was not controverted by any of the governments concerned.

A still more striking illustration of the exercise of the national right of self-defense upon the high seas, at the expense of innocent commerce, and to the entire subordination of private rights, which, except for the consequences to national interests, would have been unquestionable, is found in the British Orders in Council in the year 1809, prohibiting neutral commerce of every kind with ports which the Emperor of France had declared to be closed against British trade. The effect of

¹ "Temporary invasion of the territory of an adjoining country, when necessary to prevent and check crime, 'rests upon principles of the law of nations entirely distinct from those on which war is justified—upon the immutable principles of self-defense—upon the principles which justify decisive measures of precautions to prevent irreparable evil to our own or to a neighboring people.'" (Mr. Forsyth, Sec. of State, 1 Wharton, p. 230.)

"The first duty of a government is to protect life and property. This is a paramount obligation. For this governments are instituted, and governments neglecting or failing to perform it become worse than useless. * * * The United States Government can not allow marauding bands to establish themselves upon its borders with liberty to invade and plunder United States territory with impunity, and then, when pursued, to take refuge across the Rio Grande under the protection of the plea of the integrity of the soil of the Mexican Republic." (Mr. Evarts, Sec. of State, 1 Wharton, p. 232.)

these orders was to arrest upon the sea the lawful trade of neutrals, not with blockaded ports, nor even belligerent ports not blockaded, but with neutral ports. Yet the validity of these orders upon the principles of international law, severe as their consequences were, was affirmed by the great judicial authority of Lord Stowell, then Sir William Scott, in several cases of capture that came before him in admiralty, upon the ground that they were necessary measures of self-defense to which all private rights must give way.

In the case of the *Success* (1 Dodson Rep., p. 133), he said:

The blockade thus imposed is certainly of a new and extended kind, but has arisen necessarily out of the extraordinary decrees issued by the ruler of France against the commerce of this country, and subsists, therefore, in the apprehension of the court at least, in perfect justice.

In the case of the *Fox* (1 Edwards Adm. Rep., 314), he remarked in reference to the same orders:

When the state, in consequence of gross outrages upon the laws of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases.

Again, speaking of those retaliatory measures as necessary for the defense of commerce, he says in another case:

In that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communication of independent states is usually governed. (*The Snipe*, Edw. Adm. Rep., 382.)

Lord Stowell's judgments in these cases have never been criticised or disapproved by any court of justice, nor by any writer of repute on international law. The necessity relied upon might perhaps be questioned, but when that is established, it is not to be doubted that it becomes the measure of the right.

Another very forcible illustration of the principle contended for, is to be seen in the exclusive right asserted by Great Britain to the fisheries on the Newfoundland and Nova Scotia coasts, not only within what are called the territorial seas, but as far from the coast as the fisheries extend. The full diplomatic discussion of this subject will be found in the "*Documents relating to the transactions at the negotiation of Ghent, collected and published by John Quincy Adams, one of the Commissioners of the United States.*" The occasion was the negotiation of the treaty of peace between the United States and Great Britain, at the conclusion of the war of 1812.

One material question very much discussed and considered, was the right to be accorded to the United States in these fisheries. By the treaty of 1783 between those countries, at the close of the Revolutionary War, certain rights in them had been conceded by Great Britain to her colonies, whose independence was in that treaty admitted. When the treaty of 1815 was made, it was claimed by Great Britain that the treaty of 1783 had been abrogated by the subsequent war, and that the right of the Americans to participate in the fisheries, granted by that treaty, had by its abrogation been lost. The relative contentions of the parties will be clearly seen by perusal of Mr. Adams's exhaustive résumé of the history and merits of the question, and from the citations he adduced. (Pp. 106-109, 167-169, 184-185, 187-190.)

It was contended by Great Britain and conceded by the United States that all those fisheries, both within and without the line of territorial jurisdiction, were previous to the Revolutionary War, the exclusive property of Great Britain, as an appurtenant to its territory. On this point there was no dispute, although the fisheries in question extended in the open sea almost five degrees of latitude from the coast, and along the whole northern coast of New England, Nova Scotia, the Gulf of St. Lawrence, and Labrador.¹

Upon this view, entertained by both nations and by all the eminent diplomatists and statesmen who participated in making or discussing these treaties, the contention turned upon the true construction of the grant of fishing rights contained in the treaty of 1783. It was claimed by the British Government that this was a pure grant of rights belonging exclusively to Great Britain, and to which the Americans could have no claim, except so far as they were conferred by treaty. It was contended on the other side, that the Americans, being British subjects up to the time of the Revolutionary War, entitled and accustomed as such to share in these fisheries, the acquisition of which from France had been largely due to their valour and exertions, their right to participate in them was not lost by the Revolution, nor by the change of government which it brought about, when consummated by the treaty of 1783. And that the provisions of that treaty on the subject were to be construed, not as a grant of a new right, but as a recognition of the American title still to participate in a property that before the war was common to both countries. Which side of this contention was right, it is quite foreign to the present purpose to consider. It is enough to

¹For full quotations from Mr. Adams, see Appendix, *infra*, pp. 187-189.

perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear. No treaty stipulations would have been necessary at the end of either war. (See also Wharton's Dig. vol. III, pp. 39-48.)

It will be perceived, also, that in the case of these fisheries there was no pretense that an exclusion of the world from participating in them outside the line of the littoral sea was necessary to their preservation, or that such participation would tend to their extinction; though unquestionably it might lead to a diminution of the profits to be derived from them by the inhabitants of the territory to which they appertained.

If the countries now contending were right then in the views entertained by both governments and by all who were concerned for them, in cabinets, diplomacy, Congress, and Parliament, and in the claims then made, conceded and acted upon ever since, the precedent thus established must be decisive between them in the present case. There can not be one international law for the Atlantic and another for the Pacific. If the seals may be treated, like the fish, as only *feræ naturæ*, and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland? Why would it not be, until conceded away by treaty or thrown open to the world by consent, a proprietary right belonging to the territory to which it appertains, and which the Government has a right to defend?

But the case of the seal industry is far stronger than that of the fisheries in favor of such a right. The great facts of the nature of the animals, their attachment to the land, without which they could not exist, their constant *animus revertendi*, the protection there, in default of which they would perish, and the absolute necessity of excluding outside interference with them, in order to prevent their extinction, not only greatly strengthen the proprietary title, but annex to it the further and unquestionable right of self-defense, in respect to those

interests on shore in which the property is not denied nor open to dispute.

The jurisdiction accorded to nations over the littoral seas is by no means the only instance in which rules of international law, now completely established and universally recognized, and under which the freedom of the sea has been largely abridged, have arisen out of the right and necessity of self-defense, and out of the general principle that to such necessity individual rights and the acquisition of private emoluments upon the ocean must give way.

Some of these rules relate to the interests of nations when engaged in war, and others, like that which concedes the jurisdiction over territorial seas, chiefly to the interests of peace.

The right of self-defense, as affecting nations, is no greater in war than in peace. Certain necessities are sometimes greater in one state than in the other. But in both the measure of the necessity is the measure of the right, and the justifiable means of self-protection are such as the case requires. It is the principle that controls the case, not the case that controls the principle. The state of war only exists between the belligerents, and is only material between them and neutrals, so far as it gives rise to a particular necessity on the part of a belligerent, that would not otherwise arise.

The international law of piracy is an infringement of the right which even a criminal has, to be tried in the jurisdiction where his crime was committed, and if upon the high sea, in the jurisdiction to which his vessel belongs. Such is the rule in respect to every other crime known to the law. But if an American in an American ship commits an act of piracy on the high seas on a British vessel, he may, by the rules of international law, be captured by a French cruiser, taken into a French port, and there tried and executed, if France thinks proper to extend the jurisdiction of her courts to such a case. The reason of this well-settled rule is not found in the character of the crime, which is but robbery and murder at worst, but in the necessity of general defense, in which all sea-going nations have a like interest and therefore a like right to intervene, without waiting for the tardy or uncertain action of others.

The slave trade is an offense for which the sea is not free, though not yet regarded in international law as piracy, because there are still countries where slavery is legalized. But there is no question that a nation whose laws prohibit slavery may capture on the high sea any vessel laden with slaves intended to be landed on her coast, or any ves-

sel sailing for the purpose of prosecuting the slave trade on her shores. Nor is there any doubt that so soon as the abolition of slavery becomes universal, international law will sanction dealing with a slaver as with a pirate, and for the same reason of general self-defense.

Nor is the sea free to any vessel whatever, not carrying the flag of some country, and shown by its papers to be entitled to carry that flag; and the armed vessel of any nation may capture a vessel not so protected. Sailing independently of any particular nationality is harmless in itself, and may be consistent with entire innocence of conduct. But if allowed, it might offer a convenient shelter for many wrongs, and it is therefore prohibited by the law of nations.

Innocent trade may also be prohibited by any nation between other nations and its colonies, for reasons of policy. Such restrictions have been frequent, and their propriety has never been questioned. That a vessel engaged in such prohibited trade may be captured on the high seas and condemned, is shown by the case of *Church v. Hubbard*, and other authorities above cited.

These are instances of the exercise upon the sea of the general right of self-protection, for the common benefit of nations, irrespective of the particular necessity of any one country. In most cases, restrictions imposed upon the freedom of the sea arise out of some particular national necessity.

Thus it is well settled, that any vessel guilty of an infraction of a revenue or other law within the territorial waters of a nation, may be pursued and captured on the high seas; because, otherwise, such laws, devised for the protection of the national interests, might fail of being adequately enforced.

Upon this principle also, was based the British act putting restrictions upon the passage of a vessel on the high sea, approaching Great Britain from a port where infectious disease was raging. Quarantine and health regulations are usually enforced within the jurisdictional limit, and so confined, are in ordinary cases sufficient for their purpose. But when in a particular case they are insufficient, and the necessity of protecting the country from incursion of dangerous disease requires it, no right of freedom of the sea stands in the way of putting proper restrictions on the approach of vessels, at any distance from the shore that may be found requisite. (6 Geo. IV, chap. 78.)

The very grave, and often, to innocent individuals, ruinous restraints upon neutral trade for the interest of belligerents, the validity of which has long been established in international law, afford a strong example of

the application of the same principle. If a port is blockaded, no neutral ship can enter it for any purpose whatever, even for the continuance of a regular and legitimate commerce established before the war began. And such ship is not only prevented from entering the port, on pain of capture and confiscation of vessel and cargo, but is liable to be captured anywhere upon the high seas and condemned, if it can be shown either that the voyage is intended for a breach of the blockade, or that such breach has actually taken place. And, though such is not the general rule, it is shown by the decision of Lord Stowell, before cited, that if the necessities of a successful prosecution of the war require it, a belligerent may even interdict neutral commerce with ports not blockaded. Admitted by that great judge that such a measure is unusual, harsh, and distressing, and not to be resorted to without necessity, it is nevertheless held to be justifiable when the necessity does actually arise, though that necessity is only for the more effectual prosecution of a war.

The same rule applies to the conveyance by a neutral to a belligerent port, of freight which is contraband of war, though such freight may not be designed to be in aid of the war, but may be only the continuance of a just and regular commerce, before established. And a vessel may be captured anywhere on the high seas if found to be engaged in that business.

And so if a neutral vessel is engaged in the conveyance of belligerent dispatches or of passengers belonging to the military or naval service of a belligerent, though the vessel so employed may be a regular passenger ship on its accustomed route as a common carrier.

Hostile freight on a neutral ship has long been held liable to capture. If the rule that the flag covers the cargo may now be said to be established, it is of comparatively recent origin.

Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott, in the case of *Le Louis* (2 Dodson, 244):

This right (of search), incommotions as its exercise may occasionally be, * * * has been fully established in the legal practice of nations, having for its foundation the necessities of self-defense.¹

¹ Says Mr. Twiss (*Rights and Duties of Nations in Time of War*, ed. 1863, p. 176): "The right of visiting and searching merchant ships on the high seas, observes

It has been said that the right of search is confined to a time of war. That assertion proceeds upon the ground that only in time of war can the necessity for it arise. No one has ever claimed that the right should be denied in time of peace, if an equal necessity for it exists. And when such necessity has been regarded as existing, the right has been asserted. Prior to the war of 1812, between the United States and Great Britain, the latter country claimed the right in time of peace to search American ships on the high seas for British subjects serving as seamen. Though the war grew out of this claim, it was not relinquished by Great Britain when a treaty of peace was made. It has been disused, but never abandoned. The objection to it on the part of the United States was the obvious one that it was founded upon no just necessity or propriety. Had it been a measure in any reasonable sense necessary to self-defense on the part of Great Britain, its claim would have rested on a very different foundation, and would have been supported by the analogy of all similar cases. The right of search is exercised without question as against private vessels suspected of being engaged in the slave trade. And it is very apparent, that as the increasing exigencies of international intercourse of all kinds render it necessary, the principle that allows it in time of war will be found sufficient to allow it in time of peace. The rule, as has been seen, grows out of necessity alone, and must therefore extend with the necessity.

Lord Aberdeen, in a letter of 20th of December, 1841, to Mr. Everett, American minister (British and Foreign State Papers, vol. 30, p. 1177), claims the right of visitation of vessels on high seas in time of peace, far enough at least to ascertain their nationality. And in his dispatch to Mr. Fox, says:

Lord Stowell in the well-known case of the Swedish convoy, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned ship of a belligerent nation; because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists."

Every vessel is bound to submit to visitation and search, whether it be the vessel of a friend or of an ally or even of a subject; and submission may be compelled, if necessary, by force of arms, without giving claim for any damage incurred thereby, if the vessel upon visitation should be found not liable to be detained. * * * If the vessel be neutral, a belligerent is entitled to ascertain whether there is a contraband of war or enemy's dispatches or military or naval officers of the enemy on board.

"If the master of a neutral vessel resists by force (the right of search) that is a ground of confiscation, and consequently of capture." (Wildman's Rights of Vessels, chap. 2, p. 6.)

That it (the British Government) still maintains, and would exercise when necessary its own right to ascertain the genuineness of any flag which a suspected vessel might bear; that if in the exercise of this right, either from involuntary error or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded; but that it should entertain for a single instant the notion of abandoning the right itself would be quite impossible. (Webster's Works, vol. 6, p. 334.)

Mr. Webster disputes this right, but has to admit that it does exist when specially necessary. He says:

That there is no right to visit in time of peace *except* in the execution of revenue laws or other municipal regulations, in which cases the right is usually exercised near the coast or within the marine league, or where the vessel is justly suspected of violating the law of nations by piratical aggression; but, wherever exercised, it is a right of search. (Webster's Works, vol. VI, p. 336.)

The principle that thus subordinates private right to national necessity, is well stated by Mr. Manning (Int. Law, chap. 3, p. 252):

The greatest liberty which law should allow in civil government, is the power of doing everything that does not injure any other person, and the greatest liberty which justice among nations demands, is that every state may do anything that does not injure another state with which it is at amity. The freedom of commerce and the rights of war, both undoubted as long as no injustice results from them, become questionable as soon as their exercise is grievously injurious to any independent state, but the great difference of the interest concerned makes the trivial nature of the restriction that can justly be placed upon neutrals appear inconsiderable, when balanced against the magnitude of the national enterprises which unrestricted neutral trade might compromise. That some interference is justifiable, will be obvious on the consideration that if a neutral had the power of unrestricted commerce, he might carry to a port blockaded and on the point of surrendering, provisions which should enable it to hold out and so change the whole issue of a war: and thus the vital interests of a nation might be sacrificed to augment the riches of a single individual.

Azuni carries the principle still further, and holds that even national rights should yield to the rights of another nation, when the consequences to the latter are the more important. He remarks (part II, chap. III, art. 2, sec. 4, p. 178):

When the perfect right of one nation clashes with the perfect right of another, reason, justice, and humanity require that in such case the one that will experience the least damage should yield to the other.

And Paley, in a striking passage, applies the same principle even to the obligation to observe treaties, one of the highest obligations known to international law. (Moral Philosophy, book 6, chap. 12.)

When the adherence to a public treaty would enslave a whole people, would block up seas, rivers or harbors, depopulate cities, condemn fertile regions to eternal desolation, cut off a country from its sources of provision or deprive it of those commercial advantages to which its climate, productions, or commercial situation naturally entitle it, the magnitude of the particular evil induces us to call in question the obligation of the general rule. Moral philosophy furnishes no precise solution to these doubts. * * * She confesses that the obligation of every law depends upon its ultimate utility; that this utility having a finite and determinate value, situations may be feigned and consequently may possibly arise, in which the general tendency is outweighed by the enormity of the particular mischief.

In all these cases of restrictions upon private rights on the high seas, familiar and well settled, the principle upon which they rest is the same, the subordination of individual interest to that of a nation, when necessity requires it. Upon no other ground could they be defended. Grotius, speaking of neutral trade in articles not usually contraband of war, but used indiscriminately in war and peace, such as money, provisions, etc., says (book III, ch. 1, sec. 5):

For, if I can not defend myself without seizing articles of this nature which are being sent to my enemy, necessity gives me the right to seize them, as we have already explained elsewhere, under the obligation of restoring them unless there be some other reason supervening to prevent me.

Mr. Wheaton, commenting upon this opinion of Grotius, points out that it is placed by that author entirely upon the ground of the right of self-defense, under the necessities of a particular case; that Grotius does not claim that the transportation of such property is illegal in itself, or exposes the vessel carrying it to capture; but that necessity nevertheless justifies in the case in which it actually arises, the seizure of the vessel as a measure of self-defense. And he shows by further reference that it was the opinion of Grotius that a necessity of that sort exempts a case from all general rules. (Law of Nations, p. 128.)

Mr. Manning (p. 263) thus defines the rights of belligerents as against neutral commerce:

"It consists merely in preventing vessels from interfering with the rights of belligerents, and seeking their own emolument at the direct expense of one party in the contest."

And Azuni (part 2, chap. II, art. 2, sec. 14, p. 91) remarks:

"The truth of this theory (right of neutral trade) does not, however, deprive belligerents of the right of stopping the commerce of neutrals with the enemy, when they deem it necessary for their own defense."

The illustrations thus cited are cases of such common and frequent occurrence, that the rules which control them have become exactly formulated by courts of justice, as well as by writers on the subject, and have passed by common consent and usage into the domain of settled international law.

But many instances have occurred in the history of nations, exceptional in their character and not provided for under any general rule, where a similar necessity to that which dictated those rules has required an analogous act of self-defense by a nation, in some particular case. And such protection has been extended, through both legislative and executive action, by the governments affected. Some of these instances may be usefully referred to, since they are in complete analogy to the present case, except that, both in respect to the necessity that prompted them and the importance of the injury sought to be restrained, they all fall far short of the exigency here under consideration.

In the valuable pearl fisheries of Ceylon, the British authorities have long excluded all other nations from participation in or interference with them, though these fisheries extend into the open sea for a distance varying from 6 to 20 miles from the shore.

A regulation was enacted by the local British authorities, of March 9, 1811, authorizing the seizure and forfeiture of any vessel found hovering on the pearl banks on the west coast of Ceylon, on water of between 4 and 12 fathoms, the same being an area of the open sea extending 90 miles up and down the coast and of variable width, but distant *about 20 marine miles* from the coast at the farthest point. This regulation is still in force. (Regulations No. 3, of 1811, for the protection of Her Majesty's pearl banks of Ceylon).

An ordinance issued in 1842 prohibited the use of any dredge for fishing within the limits of the pearl banks, on pain of forfeiture and imprisonment.

The ordinance of November 30, 1843, prohibited the possession or use of nets, dredges, and other instruments such as might be prejudicial to the Government pearl banks, *within 12 miles* of any part of the shore lying between two designated points. The penalties annexed were forfeiture and imprisonment. Suspected persons might be searched. This regulation is still in force. (No. 18, 1843, an ordinance to declare illegal the possession of certain nets and instruments within certain limits.)

The ordinance of November 18, 1890, prohibited all persons from

fishing for chanks, bèches-de-mer, corals, or shells within an area lying inside of a straight line drawn up and down the coast, the ends being distant *6 miles from shore*, and the most remote point being distant over *20 miles from shore*. Forfeiture, fine, and imprisonment were the penalties prescribed. This regulation is still in force. (No. 18, 1890, an ordinance relating to chanks.) (For copies of these acts, see Case of the United States, App., Vol. I, p. 461.)

An act passed in 1888 by the federal council of Australia extended (with respect to British vessels) the local regulations of Queensland on the subject of the pearl fisheries to an area of open sea off the coast of Australia, varying in width from *12 to 250 marine miles*. Fines, seizures, and forfeitures were the penalties prescribed. (51 Vict., No. 1.)

An act passed in 1889 by the federal council of Australia extended (with respect to British vessels) the local regulations of western Australia on the subject of the pearl fisheries to an area of open sea off the northwestern coast of Australia lying within a parallelogram of which the northwestern corner is *500 marine miles* from the coast. (52 Vict., 4th Feb., 1889, Case of the United States, App., Vol. I, p. 468.)

Similar restrictions upon the pearl fisheries in the open sea have been likewise interposed by the Government of Colombia.

A decree by the governor of Panama in the United States of Colombia, in 1890, prohibited the use of diving machines for the collection of pearls within a section of the Gulf of Panama, which is between *60 and 70 marine miles* in width, and of which the most remote point is *30 marine miles* from the main land. (Gaceta de Panama, February 6, 1890, Case of the United States, App., Vol. I, p. 485.)

Legislation of the same character has also taken place in France and Italy in reference to coral reefs in the open sea and outside the jurisdictional limits.

The French law of 1864 relating to the coral fisheries of Algeria and Tunis required all fishermen to take out licenses to fish anywhere on the coral banks, which extend into the Mediterranean *7 miles* from shore. In addition to this license all foreign fishermen were required to take out patents from the Government, for which a considerable sum had to be paid; and by the recent act of 1888, foreign fishermen are precluded entirely from fishing within *3 miles* from shore, apparently leaving the former regulations in force with respect to such portions of the coral banks as lie outside of those limits. (Journal Officiel, March 2, 1888), (Case of the United States, App., Vol. I, p. 469.)

By a law enacted in Italy in 1877, and a decree issued in 1892, licenses are required of all vessels operating on the coral banks lying off the coast of Sardinia, at distances which vary from 3 to 15 miles from land.

Under the regulations there prescribed, the discoverer of a new coral bed at any point is entitled to take possession of it, and to identify his discovery by means of a buoy suitably marked, which confers upon him the privilege of working the bank as a private monopoly for two years.

Off the southwestern coast of Sicily there are three coral reefs, situated, respectively, at a distance of 14, 21, and 32 miles from shore.

The Italian law of 1877 and decree of 1882 extend to these, subject to the modifications introduced by the three following decrees. (Official Pamphlets, No. 3706, series 2 of March 4, 1877; No. 1090, series 3, November 13, 1882.)

The decree of 1877 prohibited all fishing on the nearest of the three banks, viz, that situated 14 miles from shore, and provided that the other two should be divided into sections which should be fished in rotation.

The decree of 1888 prohibited all operations on all three banks until further notice, in order that the coral, which was then almost exhausted, might be given time to renew itself.

The decree of 1892 provided that fishing might begin again under the original regulations after the close of the fishing season of 1893. (Case of the United States, App., Vol. I, p. 470).

Oyster beds in the open sea have been made the subject of similar legislation in Great Britain.

A section of the British "Sea Fisheries Act," 1868, conferred upon the Crown the right by orders in council to restrict and regulate dredging for oysters on any oyster bed within *twenty* miles of a straight line drawn between two specified points on the coast of Ireland, "outside of the exclusive fishery limits of the British Isles." The act extends to all boats specified in the order, whether British or foreign (31 and 32 Vict., ch. 45, sec. 67; Case of the United States, App., Vol. I, p. 457).

The same as to herring fisheries: "The Herring Fishery (Scotland) Act, 1889" conferred authority upon the Fishery Board of Scotland, to prohibit certain modes of fishing known as beam trawling and other trawling, within an area of the open sea on the northeastern coast of Scotland over 2,000 square miles in extent, of which the most remote point is about 30 marine miles from land (32 and 53 Vict., ch. 23, secs. 6, 7; Case of the United States, App., Vol. I, p. 458).

The taking of seal, in whatever country they have been found, has been in an especial manner the subject of legislative and governmental regulation and restriction in the open sea. And in such actions Great Britain and Canada have been conspicuous.

By an act of the British Parliament passed in 1863, the colony of New Zealand was made coextensive with the area of land and sea bounded by the following parallels of latitude and longitude, viz., 33° S., 53° S.; 162° E., 175° W. The southeastern corner of this parallelogram is situated in the Pacific Ocean over 700 miles from the coast of New Zealand (26 and 27 Vict., ch. 23, sec. 2).

In 1878 the legislature of New Zealand passed an act to protect the seal fisheries of the colony, which provides:

(1) For the establishment of an annual close season for seals, to last from October 1 to June 1.

(2) That the governor of New Zealand might, by orders in council, extend or vary this close season *as to the whole colony or any part thereof*, for three years or less, and before the expiration of such assigned period extend the close season for another three years. (See Fish Protection Act, 1878, 42 Vict., No. 43.)

Under the authority of this statute, a continuous close season was enforced by successive orders in council, from November 1, 1881, until December 31, 1889. These extreme measures were deemed necessary in order to prevent the complete extermination of the seals at an early date. (See Reports of Department of Marine of New Zealand for the years 1882, 1885, 1886-'87, 1887-'88, 1889-'90. Also the Report of the U. S. Fish Commission.)

Another act, passed in 1884, conferred additional authority upon the governor in council to make such special, limited, and temporary regulations concerning close seasons "as may be suitable *for the whole or any part or parts of this colony, etc.*" All seals or other fish taken in violation of such orders were to be forfeited with the implements used in taking them. (The Fisheries Conservative Act, 1884, 47 Vict., No. 48.)

A third act, even more stringent in its terms, was passed in 1887, which provided:

(1) That the *mere possession* of a seal by any person during a close season should be proof, in the absence of satisfactory evidence to the contrary, that it had been *illegally taken*.

(2) That all vessels taking or containing seals at such times should be forfeited to the Crown.

(3) That the commander of any public vessel might seize, search, and take any vessel so offending anywhere "within the jurisdiction of the government of the colony of New Zealand."

In other words, authority was conferred by these acts to seize vessels for illegally taking seals over an area of the open sea extending at the furthest point 700 miles from the coast; and the government of New Zealand has since kept a cruiser actively employed in enforcing these regulations. (The Fisheries Conservative Act, 1887, 51 Vict., No. 27; Rep. of U. S. Fish Com.; Case of the United States, App., Vol. I, p. 440.)

An ordinance of the Falkland Islands, passed in 1881, established a close season for the islands and the surrounding waters, from October to April in each year. Two of the islands lie 28 miles apart, and this regulation is enforced in the open sea lying between them. (Rep. of U. S. Fish Com.; affidavit of Capt. Buddington; Case of the United States, App., Vol. I, p. 435.)

The Newfoundland Seal Fishery Act, 1892, passed in April of that year by the legislature of that country, provides:

(1) That no seals shall be killed in the seal-fishing grounds lying off the island at any period of the year, except between March 14 and April 20, inclusive, and that no seal so caught shall be brought within the limits of the colony, under a penalty of \$4,000 in either instance.

(2) That no steamer shall leave any port of the colony for the seal fisheries before six o'clock a. m. on March 12, under a penalty of \$5,000.

(3) That no steamer shall proceed to the seal fisheries a second time in any one year, unless obliged to return to port by accident.

This act extends and enlarges the scope of a previous act, dated February 22, 1879, which contained similar provisions, but with smaller penalties, and also the provision which is still in force, that no seal shall be caught of less weight than 28 pounds. (55 Vict., Case of the United States, App., Vol. I, p. 442.)

The seal fisheries of Greenland were the subject of concurrent legislation in 1875, 1876, and 1877 by England, Norway, Sweden, Denmark, and Netherlands, which prohibits all fishing for seals by the inhabitants of those countries before April 3 in any year, within an area of the open sea bounded by the following parallels of latitude and longitude, viz, 67° N., 75° N., 5° E., 17° W. (British and Foreign State Papers, vol. LXX, pp. 367, 368, 513; vol. LXXIII, pp. 282, 283, 708. "The Seal Fishery Act, 1875," 38 Vict., cap. 18.)

Under the law of Uruguay the killing of seals on the Lobos and

other islands "in that part of the ocean adjacent to the departments of Maldonado and Rocha" is secured to contractors, who pay to the Government a license fee and duty. (Acts of July 23, 1857, and June 28, 1858, Caraira, vol. I, pp. 440 and 448, Digest of Laws. Appendix to the Case of the United States, Vol. I, p. 448.)

By the law of Russia, the whole business of the pursuit of seals in the White Sea and Caspian Sea, both as to time and manner, is regulated, and all killing of the seals except in pursuance of such regulations is prohibited. (Code of Russian Laws Covering Rural Industries, vol. XII, part II. Appendix to the Case of the United States, Vol. I, p. 445.)

The firm and resolute recent action of the Russian Government in prohibiting in the open sea, near the Commander Islands, the same depredations upon the seal herd that are complained of by the United States in the present case, and in capturing the Canadian vessels engaged in it, is well known and will be universally approved. That Great Britain, strong and fearless to defend her rights in every quarter of the globe, will send a fleet into those waters to mount guard over the extermination of the Russian seals by the slaughter of pregnant and nursing females, is not to be reasonably expected. The world will see no war between Great Britain and Russia on that score.

The "hovering acts" of the British Parliament and of the American Congress have already been mentioned. These hovering acts were enacted in England in 1736 and in the United States in 1799, and prohibited the transshipment of goods at sea within *4 leagues or 12 miles* of the coast. Fine and forfeiture were the prescribed penalties.

The English act prohibited any foreign vessel having on board tea or spirits from "hovering" within *2 leagues or 6 miles* of the coast.

The American act authorized the officers of revenue cutters to board, search, examine, and remain on board of all incoming vessels, domestic or foreign, when within *4 leagues or 12 miles* of the coast. (9 Geo. II, ch. 35; U. S. Rev. Stat., secs. 2760, 2867, 2868; Case of the United States, App., Vol. I, p. 493.)

The French legislation, which is in effect similar to the English and American hovering acts, has also been before alluded to.¹

The British act in reference to vessels clearing from infected ports has also been referred to, which required all vessels coming from plague-

¹ For the substance of these acts, as stated by M. Cresp, see Appendix, *infra*, page 180.

stricken places to make signals on meeting other ships, *4 leagues* from coast. (26 Geo. II, Ch. —.)

Another act establishes 2 leagues from the coast as the distance within which ships are amenable to the British quarantine regulations. (6 Geo. IV, ch. 78.)

Another act of the British Parliament affords a conspicuous instance of a control exercised over the high sea, for a long distance outside the utmost boundary of a littoral sea, as a means of a defense against a special danger then thought to exist. It was passed and enforced for the purpose of preventing the escape of the Emperor Napoleon when confined on the island of St. Helena.

This act authorized the seizure and condemnation of all vessels found hovering within *8 leagues or 24 miles* of the coast of St. Helena during the captivity of Napoleon Bonaparte on the island, reserving to ships owned exclusively by foreigners the privilege of first being warned to depart before they could legally be seized and condemned. (56 Geo. III, ch. 23; Case of the United States, App., vol. 1, p. 495.)

A still more extensive and very recent assumption of dominion over the sea for defensive and fiscal purposes, is to be found in an act passed by the legislature of Queensland on June 24, 1879, which annexed to that country all the islands lying off the northeastern coast of Australia, within a defined limit, which, at its furthest point, extends 250 miles out to sea.

The boundary thus adopted includes nearly the whole of Torres Strait, a body of water 60 miles in width, separating Australia from New Guinea, and forming the connecting link between the Pacific and Indian oceans.

Under the authority of this Annexation Act, the Government of Queensland has exercised complete police jurisdiction over the Strait, has suppressed the traffic in liquor in the objectionable form in which it formerly prevailed, and has derived from the traffic as since restricted, a large revenue through the medium of customs duties. (43 Vict., ch. 1. Rep. U. S. Fish Com. See "Gold-Gems and Pearls in Ceylon and Southern India," by A. M. & L, 1888, p. 296.) (Case of the United States, App. Vol. I, p. 467.)

An effort is made in the British counter case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestions that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of

those countries outside the territorial limits of such jurisdiction. In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which if they are reasonable and necessary for the defense of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the government at its discretion.

Otherwise their effect would be to exclude the citizens of the country in which they are enacted from a use of the marine products it is seeking to defend, which is left open to the inhabitants of all other countries, thus leaving those products to be destroyed, but excluding their own people from sharing in the profits to be made out of the destruction. Will it be contended that such is the result that is either contemplated or allowed to take place by the governments which have found it necessary to adopt such restrictions?

It would be much more to the purpose if it could be shown either that any nation had ever protested against or challenged the validity of any of these regulations outside the territorial line, or that any individual had ever been permitted to transgress there with impunity. In the case of any of the statutes of Great Britain and her colonies that have been referred to, if any enterprising poacher, armed with an attorney and a battery of authorities on the subject of the extent of statute jurisdiction, should attempt the extermination or even the injury of the protected products, in defiance of the regulations prescribed, he would speedily ascertain, without the assistance of an international arbitration, that he had made a mistake, and that to succeed in his undertaking he would need to be backed up by a fleet too strong for Great Britain to resist.

In the light of this accumulation of authority and precedent, drawn from every source through which the sanction of international law can be derived or the general assent of mankind expressed, what more need be said in elucidation of the grounds upon which this branch of the case of the United States reposes? Have we not clearly established the proposition, that the dominion over the sea, once maintained by maritime nations, has been surrendered only so far as to permit such private use as is neither temporarily nor permanently injurious to the

important and just interests of those nations, and that as against such injury, however occasioned, the right of defense has always been preserved, and has always been asserted on the high sea, and even upon foreign territory. It will be seen, we respectfully submit, that this case presents nothing new, except the particular circumstances of the application of an universal and necessary principle to an exigency that has not arisen in this precise form before.

The steadfast advance which the law of nations has made, from the days of its rudiments to the present time, and which still must continue to be made through all time, has been and must always be by the process of analogy, in the application of fundamental principles, from which the rules of all new cases as they successively and constantly arise must be deduced. Neither this nor any other system of human law can stand still, for it must perish unless it keeps pace with the vicissitudes of society, and meets adequately all the new emergencies and requirements which they from time to time produce. Law has its roots in the past, but its efficacy must take place in the present. Says Mr. Phillimore (*Int. Law*, vol. 1, sec. 39):

Analogy has great influence in the decision of international as well as municipal tribunals; that is to say, the application of the principle of a rule which has been adopted in certain former cases, to govern others of a similar character as yet undetermined.

Analogy is the instrument of the progress and development of the law. (*Bowyer's Readings*, p. 88.)

If a precedent arising upon the same facts is not forthcoming, it is only because there is no precedent for the conduct complained of. The same right was never before invaded in the same way. That does not take the case out of the operation of the principle upon which all precedents in analogous incidents depend, and it applies with the same force to every case that arises within its scope. The particular precedent is created when the necessity for it appears. The absence of it when the necessity has never arisen, proves nothing. The only inquiry is whether the case comes within the general rule.

But were it possible to regard the present case as in any respect outside the scope of rules hitherto established, its determination would then be remitted to those broader considerations of moral right and justice which constitute the foundation of international law. It is the application of those cardinal principles that must control every case of new impression that can arise between nations. The law of nations

has no other source than that, except in its conventionalities. Sir R. Phillimore, in *Queen v. Kehn* (*supra*, p. 68), remarks in respect to such a case:

Too rudimental an inquiry must be avoided, but it must be remembered that the case is one of *primæ impressionis*, of the greatest importance both to England and to other states. and the character of it in some degree necessitates a reference to first principles. In the memorable answer pronounced by Montesquieu to be *réponse sans réplique*, and framed by Lord Mansfield and Sir George Lee, of the British, to the Prussian Government: "The law of nations is said to be founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.

Chancellor Kent says (1 Commentaries, p. 32):

As the end of the law of nations is the happiness and perfection of the general society of mankind, it enjoins upon every nation the punctual observance of benevolence and good will as well as of justice towards its neighbors. This is equally the policy and the duty of nations. * * * (p. 181). The law of nations is placed under the protection of public opinion. * * * Its great fundamental principles are founded in the maxims of eternal truth, in the immutable law of moral obligation, and in the suggestions of enlightened public interest.¹

Many authorities on this point have been presented in a former branch of this argument. They might be multiplied to an indefinite extent, as well from continental as from English and American writers and judges. But apology should rather be offered for citing any authority at all, upon a proposition so fundamental and so obvious.

It is with the greatest respect submitted, and in our judgment it

¹Says Judge Story (Con. of Laws, sec. 3): "In resting on the basis of general convenience and the enlarged sense of national duty, rules have from time to time been promulgated by jurists and supported by courts of justice by a course of judicial reasoning which has commanded almost universal confidence, respect, and obedience, without the aid either of municipal statutes or of royal ordinances, or of international treaties."

Mr. Twiss (Int. Law, part 1, sec. 86), divides the sources of law of nations as follows: "The natural or necessary law of nations, in which the principles of natural justice are applied to the intercourse between states; secondly, customary law of nations which embodies those usages which the continued habit of nations has sanctioned for their mutual interest and convenience, and thirdly, the *conventional* or *diplomatic* law of nations. * * * Under this last head many regulations will now be found which at first resulted from custom or a general sense of justice."

Mr. Amos, in his note to Manning (book 2, chap. 1, p. 85) remarks: "Though the customary usages of states in their mutual intercourse must always be held to afford evidence of implied assent, and to continue to be a mean basis of a structure of the law of nations, yet there are several circumstances in modern society which seem to indicate that the region of the influence will become increasingly restricted as compared with that of the influence of well-ascertained ethical principles and formal convention."

can not be too clearly kept in view, that the duty requested of this High Tribunal is not the discussion of abstract theories, nor the establishment of propositions applicable to cases not before it, nor the determination of diplomatic controversies that have long ceased to be material. The question, and the only question to be decided, is whether the owners of the Canadian vessels engaged in the destruction of the seals in Bering Sea, have an indefeasible right as against the Government of the United States, upon the circumstances of this case, to continue such destruction, at the times, in the places, in the manner, and with the consequences shown by the evidence. That question is neither technical nor scholastic, nor does it depend upon finespun reasoning or recondite learning. It is to be regarded in the large and fair-minded view which accords with the dignity of the parties to this controversy, the character of the Tribunal to which they have submitted it, and a just deference to that opinion of civilized mankind which is the ultimate criterion of international law, and the final arbitrator in all international disputes. Surveyed in this light, upon its just and actual facts, and looking at it as it stands apparent to the world, what are its proposals, when fairly and simply stated? Let the leading facts before stated, be recapitulated.

Here is a herd of amphibious animals, half human in their intelligence, valuable to mankind, almost the last of their species, which from time immemorial have established their home with a constant *animus revertendi* on islands once so remote from the footsteps of man, that these, their only denizens, might reasonably have been expected to be permitted to exist, and to continue the usefulness for which the beneficence of the Creator designed them. Upon these islands their young are begotten, brought forth, nurtured during the early months of their lives, the land being absolutely necessary to these processes, and no other land having ever been sought by them, if any other is in fact available, which is gravely to be doubted.

The Russian and United States Governments, successively proprietors of the islands, have by wise and careful supervision cherished and protected this herd, and have built up from its product a permanent business and industry valuable to themselves and to the world, and a large source of public revenue, and which at the same time preserves the animals from extinction, or from any interference inconsistent with the dictates of humanity.

It is now proposed by individual citizens of another country, to lie

in wait for these animals on the adjacent sea during the season of reproduction, and to destroy the pregnant females on their way to the islands, the nursing mothers after delivery while temporarily off the islands in pursuit of food, and thereby the young left there to starve after the mothers have been slaughtered; the unavoidable result being the extermination of the whole race, and the destruction of the valuable interests therein of the United States Government and of mankind; and the only object being the small, uncertain, and temporary profits to be derived while the process of destruction lasts, by the individuals concerned.

And it is this conduct, inhuman and barbarous beyond the power of description, criminal by the laws of the United States and of every civilized country so far as its municipal jurisdiction extends, in respect to any wild animal useful to man or even ministering to his harmless pleasure, that is insisted upon as a part of the sacred right of the freedom of the sea, which no nation can repress or defend against, whatever its necessity. Can anything be added to the statement of this proposition that is necessary to its refutation?

What precedent for it, ever tolerated by any nation of the earth, is produced? From what writer, judge, jurist, or treaty is authority to be derived for the assertion that the high sea is or ever has been free for such conduct as this, or that any such construction was ever before given to the term "freedom of the sea" as to throw it open to the destruction, for the profit of individuals, of valuable national interests of any description whatever? Let those who claim to set up such a right as justified by any known law of nations, produce the authority or the precedent to establish it.

If this proposal were submitted to the enlightened judgment of mankind, if the question of its acceptance were made to depend upon those considerations of justice, morality, humanity, benevolence, and fair dealing that, as we have seen, form the groundwork of international law, and of all usages under it that have become established, it can not be open to doubt what the answer to it must be. There can be but one side to such an inquiry, if ideas of right and wrong, or even of sound policy, are to prevail. To escape that result, some arbitrary and inflexible rule of controlling law must be discovered, against which justice, morality, and fair dealing are powerless. We deny that any such rule forms a part, or can ever be permitted to form a part, of any recognized system of international law.

Many cases may be supposed, each of which, should it arise, would be in its particular facts a new case, in illustration of the proposition for which we contend. Suppose that some method of explosive destruction should be discovered by which vessels on the seas adjacent to the Newfoundland coast outside of the jurisdictional line could, with profit to themselves, destroy all the fish that resort to those coasts, and so put an end to the whole fishing industry upon which their inhabitants so largely depend. Would this be a business that would be held justifiable as a part of the freedom of the sea? although the fish are admitted to be purely *feræ naturæ*, and the general right of fishing in the open sea outside of certain limits is not denied.

An Atlantic cable has been laid between America and Great Britain, the operation of which is important to those countries and to the world. Suppose some method of deep-sea fishing or marine exploration should be invented, profitable to those engaged in it, but which should interrupt the operation of the cable and perhaps endanger its existence. Would those nations be powerless to defend themselves against such consequences, because the act is perpetrated upon the high sea?

Suppose vessels belonging to citizens of one country to be engaged in transporting for hire across the sea to ports of another, emigrants from plague-stricken and infected places, thus carrying into those ports a destructive contagion. If it should be found that measures of defense inside of the three-mile or cannon-shot lines were totally inadequate and ineffectual, would the nation thus assailed be deprived of the power of defending itself against the approach of such vessels, as far outside that line as the actual necessity of the case might require? This question is answered by the acts of the British Parliament before referred to, applicable to just such a case.

If a light-house were erected by a nation in waters outside of the 3-mile line, for the benefit of its own commerce and that of the world, if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that government be defenseless? Lord Chief Justice Cockburn answers this inquiry in the case of *Queen v. Kehn* above cited (p. 198) when he declares that such encroachments upon the high sea would form a part of the defense of a country, and "come within the principle that a nation may do what is necessary for the protection of its own territory."

In any of these cases, would it be necessary for the nation assailed

to supplicate the government to which its assailants belonged, to prevent the mischief complained of, as a matter of voluntary comity, and if such application were disregarded, to submit? The whole history of the maritime world, and of Great Britain above all other countries is to the contrary. So far from individual rights on the sea of such a mischievous and injurious character having become recognized and established by the assent of mankind, so as to be regarded as justified by the international law that results from such an assent, the judgment and the conduct of nations have been altogether the other way, and necessarily must always be the other way if they are to protect themselves, their interests, and their people from destruction.

It will be seen from the correspondence between the governments of Great Britain and the United States, printed in the Appendix to the Case of the United States, that a convention between the two countries was virtually agreed upon as early as 1887, with the full concurrence of Russia, under which pelagic sealing in Behring Sea would have been prohibited between April 15 and October 1 or November 1 in each year, and that the consummation of this agreement was only prevented by the refusal of the Canadian Government to assent to it. The propriety and necessity of such a repression was not doubted, either by the United States, Great Britain, or Russia. This convention, if completed, would have fallen far short both of the just right and the necessity of the United States in respect to the protection of the seals, as is now made apparent in the light of the much larger knowledge of the subject which has since been obtained. Still, it would have been a step toward the desired end.

When it became apparent that Great Britain would be unable to consummate the proposed agreement, and that no restraint would be put by Her Majesty's Government on the depredations of its colonists complained of, if the United States Government had then taken the course which has since been pursued by the Government of Russia in respect to the seals on the Commander Islands, and refused to permit further slaughter of the seals in Bering Sea during the breeding time, what is it reasonable to believe would have been the judgment of the civilized world, as to the justice and propriety of the position thus assumed? Would not such action have been approved and acquiesced in by all nations, as it has been shown that similar action by many countries in all similar cases that have arisen has been approved and acquiesced in? And if it can be supposed, as it certainly can not be

supposed without casting an unwarrantable aspersion upon Her Majesty's Government, that Great Britain would have undertaken to maintain by naval force the Canadian vessels in the conduct in question, how far is it to be believed that she would been sustained by the general opinion of the world? More especially in view of the claim she has always successfully and justly asserted, of the right to protect all interests of her own against injury by individuals on the high sea for the sake of gain.

And finally, if by the concurrent action of the United States, Great Britain, and Russia, a prohibition of pelagic sealing during the breeding time had been effected, as proposed, would those three powers combined have had a better right to exclude any casual poacher under the flag of some other government from the depredations prohibited, than the United States now has, standing alone? Or would they have been constrained, by the requirements of what is called international law, to occupy the humiliating position of standing idly by, while the interests they had found it necessary to unite in protecting, should be deliberately destroyed for the benefit of a few adventurers, whose methods defied law and disgraced humanity.

What the United States Government would have been justified in doing in self-defense, by the exertion of such reasonable force as might be necessary, is precisely what she has a right to ask in the judgment of this Tribunal. There can not be one system of international law for the world and another for the closet, because the closet does not prescribe the law of nations; it derives it from those principles of right and justice which are adopted as a rule of action by the general assent and approval of mankind.

Instead of taking its defence into its own hands, the Government of the United States has refrained from the exercise of that right, has submitted itself to the judgment of this Tribunal, and has agreed to abide the result. Its controversy is only nominally with Great Britain, whose sentiment and whose interest concur in this matter with those of the United States. It is really with a province of Great Britain, not amenable to her control, with which the United States Government has no diplomatic relations, and can not deal independently. Although the erroneous assumption that the United States claimed the right to make Bering Sea a *mare clausum*, has undoubtedly drawn Her Majesty's Government into a position in this dispute that it might not otherwise have taken.

If by the judgment of this high and distinguished Tribunal the Alaskan seal herd is sentenced to be exterminated, a result which the United States Government has been unable to anticipate, it must submit, because it has so agreed. But it will not the less regret having thus bartered away that plain right of self-defense against unwarranted injury, which no nation strong enough to assert itself has ever surrendered before.

E. J. PHELPS.



APPENDIX TO PART THIRD. DIVISION II (MR. PHELPS'S ARGUMENT).

ADDITIONAL AUTHORITIES ON THE QUESTION ON PROPERTY.

[NOTE 1, PAGE 132. OPINION IN HANNAM *vs.* MOCKETT. (2 BARNWALL AND CRESSWELL, 943.)]

BAGLEY, J. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action, and the question then is whether there is any injury to any property the plaintiff had a special right to acquire.

A man in trade has a right in his fair chances of profit, and he gives up time and capital to acquire it. It is for the good of the public that he should. But, has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expense in enticing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether, indeed, they will not be a nuisance to the neighborhood? This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.

They, of their own choice, and without any expenditure or trouble on his part, have a predilection for his trees, and are disposed to resort to them. But, has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind the nature and properties of the birds are not immaterial. The law makes a distinction between animals fitted for food and those which are not; between those which are destructive of private property and those which are not; between those which have received protection by common law or by statute and those which have not.

It is not alleged in this declaration that these rooks were fit for food; and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the legislature as destructive in their nature, and as nuisances to the neighborhood where they are established. *Keeble vs. Hickeringill* (11 East., 574) bears a stronger resemblance to the present than any other case, but it is distinguishable. * * * But in the first place, it is observable that wild fowl are protected by the statute 25 H. 8, c. 11; that they constitute a known article of food; and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public.

It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. That case, therefore, stands on a

different foundation from this. All the other instances which were referred to in the argument on the part of the plaintiff are cases of animals specially protected by acts of Parliament, or which are clearly the subjects of property. Thus hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teals, widgeons, wild geese, black game, red game, bustards, and herons are all recognized by different statutes as entitled to protection, and consequently in the eye of the law are fit to be preserved.

[KEEBLE *vs.* HICKERINGILL. HILARY TERM 5 ANNE, HOLT'S REPORTS, p. 17.]

Action by owner of a decoy pond, frequented by wild fowl, against one who shot off a gun near his pond to the plaintiff's loss, etc.

During the course of the discussion by the judges, Holt, C. J., said:
* * * "And the decoys spoil gentlemen's game, yet they are not unlawful, for they bring money into the country. Dove cotes are lawful to keep pigeons.

Powell: The declaration is not good, but this being a special action on the case, it is helped by the verdict. If you frighten pigeons from my dove cote, is not that actionable?

Montague: Yes, for they have *animus revertendi*, and therefore you have property.

In Vol. II, East's Reports, p. 571, is the case of Carrington *vs.* Taylor, which is also a case upon the subject of injury to the owner of a decoy pond. The reporter, in a note to this case, reports at length *Keeble vs. Hickeringill*, which he states "is taken from a copy of Lord C. J. Holt's own MSS. in my possession."

In this report it is said: "Holt, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but it is not new in the reason or principle of it. * * * And we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wild fowl, in order to be taken for the profit of the owner of the pond, who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action.

[NOTE 1, (PAGE 149). EXTRACT FROM OPINION OF CHIEF JUSTICE MARSHALL IN *CHURCH vs. HUBBART*, 2 CR., 187.]

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere maritime trespass not within the exception, cannot be admitted. To reason from the extent of the protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle, the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted,

because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy. So, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the Government will be assented to. Thus in the Channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the Guarda Costas of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries.

Indeed, the right given to our own revenue cutters to visit vessels four leagues from our coasts is a declaration that in the opinion of the American Government no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws of the usages of nations, which gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora* by the Portuguese governor was an act of lawless violence.

[NOTE 1, PAGE 150. OPINION OF JUDGE JOHNSON IN *ROSE vs. HIMELY*, 4 CR. 241.]

I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and though not so, that the capture may be justified, although for the breach of a municipal law. In support of my latter position, both principle and the practice of Great Britain and our own Government may be appealed to. The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does not act inconsistent with that general equality of nations which exists upon the ocean.

The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sover-

own rights of the nation to which she belongs, because it is the law of reason and the general understanding of nations that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self-defense in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise.

The act of Great Britain of 24 Geo., 3, Chap. 47, is predicated upon these principles. It subjects vessels to seizure which approach with certain cargoes on board within the distance of four leagues of her coast, because it would be difficult, if not impossible, to execute her trade laws if they were suffered to approach nearer in the prosecution of an illicit design; but if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws, and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade appear to have been framed in some measure after the model of the English statutes; and the twenty-ninth section of the act of 1799 expressly authorizes the seizure of a vessel that has within the jurisdiction of the United States committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast.

So also the act of 1806, for prohibiting the importation of slaves, authorizes a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expression that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit would be actually without limitation. Indeed, after passing the jurisdictional limits of a State, a vessel is as much on the high seas as if in the middle of the ocean, and if France could authorize a seizure at the distance of 2 leagues, she could at the distance of 20. * * * Seizure on the high seas for a breach of the right of blockade during the whole return voyage, is universally acquiesced in as reasonable exercise of sovereign power. The principle of blockade has, indeed, in modern times, been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of nations when confined within the limits of reason and necessity.

[NOTE 1 (PAGE 152). CITATIONS FROM CONTINENTAL WRITERS ON THE SUBJECT OF SELF DEFENSE.]

Every nation may appropriate things, the use of which, if left free and common, would be greatly to its prejudice. This is another reason why maritime powers may extend their domain along the seacoast, as far as it is possible, to defend their rights. * * * It is essential to their security and the welfare of their dominions. (Azuni, Part I, Chap. II, Art. I, Sec. 4, page 185.)

Plocque (*De la Mer et de la Navigation Maritime*, ch. I, pp. 6-8), after discussing the limits of the territorial sea, and pointing out the great divergence of opinion that had existed on that point, remarks:

"Moreover, in custom-house matters, a nation can fix at will the point where its territorial sea ends; the neighboring nations are sup-

posed to be acquainted with these regulations, and are, consequently, obliged to conform thereto. As an example, we will content ourselves with quoting the law of Germinal 4th, year II, Art. 7, Tit. 2: 'Captains and officers and other functionaries directing the custom-house, or the commercial or naval service, may search all vessels of less than 100 tons burden when lying at anchor or tacking within four leagues from the coast of France, cases of *ris major* excepted. If such vessels have on board any goods whose importation or exportation is prohibited in France, the vessels shall be confiscated as well as their cargoes, and the captains of the vessels shall be required to pay a fine of 500 livres.'

Says Pradier-Fodéré (Traité de Droit Internationale, Vol. II, sec. 633):

"Independently of treaties, the law of each state can determine of its own accord a certain distance on the sea, within which the state can claim to exercise power and jurisdiction, and which constitutes the territorial sea, for it and for those who admit the limitation. This is especially for the surveillance and control of revenues."

And in a note to this passage he says:

"In effect, in the matter of revenue, a nation can fix its own limits, notwithstanding the termination of the territorial sea. Neighboring nations are held to recognize these rules, and in consequence are considered to conform to them. On this point the French law of the 4th Germinal, year II, can be cited."

This law fixes two myriameters, or about twelve English miles as the limit within which vessels are subject to inspection to prevent fraud on the revenue.

La Tour (De la mer territoriale, page 230), speaking of the extritorial effect of the French revenue laws at four leagues from the coast, thus justifies them.

"Is not this an excessive limit to which to extend the territorial sea? No, we assert. At the present day this question will hardly bear discussion, on account of the long range of cannon; and though we should return to the time when that range was less, we should still undertake to justify this extension of the custom-house radius; and for this it is sufficient to invoke the reasons given in matters of sanitary police. It does not involve simply a reciprocal concession of states, or a tacit agreement between them, but it is the exercise of their respective rights. * * *

"The American and English practice allows the seizure, even outside of the ordinary limit of the territorial waters, of vessels violating the custom laws."

Says M. Calvo (Le droit international, sec. 244):

"In order to decide the question in a manner at once rational and practical, it should not be lost sight of at the outset that the state has not over the territorial sea a right of property, but a right of inspection and of jurisdiction in the interest of its own safety, or of the protection of its revenue interests.

"The nature of things demonstrates, then, that the right extends up to that point where its existence justifies itself, and that it ceases when the apprehension of serious danger, practical utility, and the possibility of effectively carrying on definite action cease.

"Maritime states have an incontestible right, however, for the defense of their respective territories against sudden attack, and for the protection of their interests of commerce and of revenues, to establish

an active inspection on their coast and its vicinity, and to adopt all necessary measures for shutting off access to their territory to those whom they may refuse to receive, where they do not conform to established regulations. It is a natural consequence of the general principle, that whatever anyone shall have done in behalf of his self-defense he will be taken to have done rightly.

"Every nation is thus free to establish an inspection and a police over its coasts as it pleases, at least where it has not bound itself by treaties. It can, according to the particular conditions of the coasts and waters, fix the distance correspondingly. A common usage has established a cannon shot as the distance which it is not permitted to overleap, except in the exceptional case, a line which has not alone received the approval of Grotius, Bynkershök, Galiana, and Klüber, but has been confirmed likewise by the laws and treaties of many of the nations.

"Nevertheless we can maintain further with Vattel that the dominion of the state over the neighboring sea extends as far as it is necessary to insure its safety, and as far as it can make its power respected. And we can further regard with Rayneval the distance of the horizon which can be fixed upon the coast as the extreme limit of the measure of surveillance. The line of the cannon shot, which is generally regarded as of common right, presents no invariable base, and the line can be fixed by the laws of each state at least in a provisional way." (Heffter, *Int. Law*, Secs. 74-75.)

Bluntschli says: (*Int. Law*, Book IV, sec. 322).

"The jurisdiction of the neighboring sea does not extend further than the limit judged necessary by the police and the military authorities."

And section 342:

"Whenever the crew of a ship has committed a crime upon land, or within water included in the territory of another state and is pursued by judicial authorities of such state, the pursuit of the vessel may be continued beyond the waters which are a part of the territory, and even into the open sea."

And in a note he says:

"This extension is necessary to insure the efficiency of penal justice. It ends with the pursuit."

Carnazza-Amari (*Int. Law*, sec. 2, chap. 7, page 60), after citing from M. Calvo the passage quoted above, says:

"Nevertheless states have a right to exact that their security should not be jeopardized by an easy access of foreign vessels menacing their territory; they may see to the collection of duties indispensable to their existence, which are levied upon the national and foreign produce, and which maritime contraband would doubtless lessen if it should not be suppressed. From all these points of view it is necessary to grant to each nation the right of inspection over the sea which washes its coasts, within the limits required for its security, its tranquillity, and the protection of its wealth. * * * States are obliged, in the interest of their defense and their existence, to subject to their authority the sea bordering the coast as far as they are able, or as far as there is need, to maintain their dominion by force of arms. * * *

"It is necessary to concede to every nation a right of surveillance over the bordering sea within the limits which its security, its tranquillity, and its wealth demand. * * * Balde and other authorities place the line at 60 miles from the shore. Gryphander and Pacuinez, at 100. Locennius, at a point from which a ship can sail in two days. Bynkersh ock maintains that the territorial sea extends as far as the power of artillery. This limit is regarded as the correct one, not because it is founded on force, but because it is the limit necessary for the safety of the state."

[NOTE 1, PAGE 153. THE CAROLINE CASE.]

Mr. Webster said, addressing the British Government:

"Under those circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts and what rules of international law the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.

"It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing." (Webster's Works, Vol. VI, page 261.)

Lord Ashburton in his reply says:

"Every consideration, therefore, leads us to set as highly as your Government can possibly do this paramount obligation of reciprocal respect for the independent territory of each. But however strong this duty may be, it is admitted by all writers, by all jurists, by the occasional practice of all nations, not excepting your own, that a strong overpowering necessity may arise when this great principle may and must be suspended. It must be so, for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity. Self-defense is the first law of our nature, and it must be recognized by every code which professes to regulate the condition and relations of man. Upon this modification, if I may so call it, of the great general principle, we seem also to be agreed; and on this part of the subject I have done little more than repeat the sentiments, though in less forcible language, admitted and maintained by you in the letter to which you refer me.

"Agreeing, therefore, on the general principle, and on the possible exception to which it is liable, the only question between us is whether this occurrence came within the limits fairly to be assigned to such exceptions; whether, to use your words, there was that necessity of self-defense, instant, overwhelming, leaving no choice of means, which preceded the destruction of the *Caroline* while moored to the shore of the United States. Give me leave, sir, to say, with all possible admiration of your very ingenious discussion of the general principles which are supposed to govern the right and practice of interference by the people of one country in the wars and quarrels of others, that this part of your argument is little applicable to our immediate case. If Great Britain, America, or any other country, suffer their people to fit out

expeditions to take part in distant quarrels, such conduct may, according to the circumstances of each case, be justly matter of complaint, and perhaps these transactions have generally been in late times too much overlooked or connived at.

"But the case we are considering is of a wholly different description, and may be best determined by answering the following question: Supposing a man standing on ground where you have no legal right to follow him, has a weapon long enough to reach you, and is striking you down and endangering your life, how long are you bound to wait for the assistance of the authority having the legal power to relieve you? Or, to bring the facts more immediately home to the case, if cannon are moving and setting up in a battery which can reach you, and are actually destroying life and property by their fire; if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so than by seizing your assailant on the verge of neutral territory?" (British and Foreign Correspondence for 1841, 1842, Vol. 30, page 196.)

Lord Campbell says of this case in his autobiography (Life, etc., edited by Mrs. Hardcastle, 1881, Vol. 2, p. 118):

"The affair of the *Caroline* was much more difficult. Even Lord Grey told me he thought we were quite wrong in what we had done; but assuming the facts that the *Caroline* had been engaged and when seized by us was still engaged in carrying supplies and military stores from the American side of the river to the rebels in Navy Island, part of the British territory, that this was permitted or could not be prevented by the American authorities, I was clearly of opinion that although she lay on the American side of the river when she was seized, we had a clear right to seize and to destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which were fired against the Queen's troops in Navy Island. I wrote a long justification of our Government, and this supplied the arguments used by our foreign secretary, till the Ashburton treaty hushed up the dispute."

Mr. Calhoun said of it in a speech in the Senate in which he insisted that the capture of the *Caroline* in American waters was unjustifiable, because unnecessary:

"It is a fundamental principle in the law of nations that every state or nation has full and complete jurisdiction over its own territory to the exclusion of all others, a principle essential to independence, and therefore held most sacred. It is accordingly laid down by all writers on those laws who treat of the subject that nothing short of extreme necessity can justify a belligerent in entering with an armed force on the territory of a neutral power, and when entered, in doing any act which is not forced on him by the like necessity which justified the entering."

[NOTE 1 (PAGE 156.) NEGOTIATION BETWEEN UNITED STATES AND GREAT BRITAIN RELATIVE TO THE NEWFOUNDLAND FISHERIES.]

Mr. Adams says (documents relating to the negotiations of Ghent, page 184):

"That fishery, covering the bottom of the banks which surround the island of Newfoundland, the coasts of New England, Nova Scotia, the Gulfs of St. Lawrence and Labrador, furnishes the richest treasure and

the most beneficent tribute the ocean pays to earth on this terraqueous globe. By the pleasure of the Creator of earths and seas, it has been constituted in its physical nature one fishery, extending in the open seas around that island to little less than five degrees of latitude from the coast, spreading along the whole northern coast of this continent, and insinuating itself into all the bays, creeks, and harbors to the very borders of the shores. For the full enjoyment of an equal share in this fishery it was necessary to have a nearly general access to every part of it. • • •

"By the law of nature this fishery belonged to the inhabitants of the regions in the neighborhood of which it was situated. By the conventional law of Europe it belonged to the European nations which had formed settlements in those regions. France, as the first principal settler in them, had long claimed exclusive right to it. Great Britain, moved in no small degree by the value of the fishery itself, had made the conquest of all those regions from France (by force), and had limited, by treaty, within a narrow compass the right of France to any share in the fishery. Spain, upon some claim of prior discovery, had for some time enjoyed a share of the fishery on the banks, but at the last treaty of peace prior to the American Revolution had expressly renounced it. At the commencement of the American Revolution, therefore, this fishery belonged exclusively to the *British nation*, subject to a certain limited participation in it reserved by treaty stipulations to France."

He further cites (page 185) an act of the British Parliament passed in March, 1875:

"In March, 1775, the British Parliament passed an act to restrain the trade and commerce of the provinces of Massachusetts Bay and New Hampshire, and colonies of Connecticut and Rhode Island, and Providence Plantation in North America, to Great Britain, Ireland, and the British Islands in the West Indies, and to prohibit such provinces and colonies from carrying on any fishery on the banks of Newfoundland and other places therein mentioned, under certain conditions and limitations."

And the remarks of Lord North in bringing in the bill:

"In particular he said that the fishery on the banks of Newfoundland and the other banks and all the others in America was the undoubted right of Great Britain; *therefore we might dispose of them as we pleased.*"

Mr. Adams again observes (page 187):

"The whole *fishery* (with the exception of the reserved and limited right of France) was the *exclusive property* of the British Empire. The right to a full participation in that property belonged by the law of nature to the people of New England from their locality."

And in support of the validity of this proprietary right, he quotes (page 107) the passage from Vattel heretofore cited. (Vattel, 1 Ch., 23.)

He cites also (page 169) from Valin (Vol. 2, page 693) in respect to these fisheries as follows:

"As to the right of fishing upon the bank of Newfoundland, as that island which is as it were the seat of this fishery then belonged to France, it was so held by the French that other nations could naturally fish there only by virtue of the treaties. This has since changed by means of the cession of the island of Newfoundland made to the English by the treaty of Utrecht; but Louis XIV, at the time of that cession, made an express reservation of the right of fishing upon the bank of Newfoundland, in favor of the French as before."

And Mr. Adams quotes (page 169) from Mr. Jefferson's Report on the Fisheries, of February 1, 1791, as follows:

"Spain had formally relinquished her pretensions to a participation in these fisheries at the close of the preceding war, and at the end of this, the adjacent continent and islands being divided between the United States and the English and French, for the last retained two small islands merely for this object, the right of fishing was appropriated to them also."

And he quotes also (pages 189, 190) the language of Lord North and Lord Loughborough in the debate in Parliament on the treaty of 1763, in which the concession to the Americans in that treaty of rights of fishing was treated as an improvident and unnecessary concession.

[NOTE 1, PAGE 169. FRENCH LEGISLATION FOR REVENUE PROTECTION.]

Law or decree of August 6, 1791, Title III, Article I: "All goods prohibited admission which may be entered by sea or by land shall be confiscated as well as the ships under fifty tons, etc."

Article II: "All prohibited goods shall be accounted for according to the terms of the above article, * * * which the revenue officers shall have found within the two leagues of the coasts on vessels under fifty tons."

Title 13 of the police in general, article 6: "The inspection of the vessels, tenders, or of the sloops can take place at sea or on the rivers."

Article VII: "The officers of inspections on the said tenders can visit the vessels under fifty tons which may be found at sea at the distance of two leagues from the coast, and to receive the bills of lading concerning their cargo. If these vessels are loaded with prohibitive goods the seizure of the same shall be made, and confiscation shall be pronounced against the master of the vessel with a penalty of five hundred pounds."

Law or decree of the 4th Germinal, year 2d, March 24, 1794, relating to maritime commerce and revenue:

Title II, article 3: "The captain arriving within the four miles of the coast will submit when required, a copy of the manifest to the custom-house official who will come on board, and will visé the original."

Article 7: "The captain and the other officers on the revenue vessels may visit all ships under one hundred tons which are at anchor or luffing within the four leagues of the coasts of France, excepting they be of superior strength. If the ships have on board goods of which the import into and export from France is prohibited, they shall be confiscated, as well as the cargoes, together with a fine of five hundred pounds against the captains of the ships."

Provisions confirmed by the following laws:

Law of March 27, 1817, article 13: "The same penalty shall be applied in the case provided by article 7 of law of the 4th Germinal, year 2, Title II, to ships under one hundred tons overtaken, except they be of superior strength, within the two myriameters (four leagues) of the coasts, having on board forbidden merchandise."

FOURTH.

CONCURRENT REGULATIONS.

The five questions which, in the order adopted by the Treaty, are first submitted to the Tribunal of Arbitration, may for practical purposes be reduced to two; and these present for consideration the two general grounds upon which, in the contemplation of the Treaty, the United States might assert a right to prevent the pursuit and capture of the Alaskan fur-seals on the high seas. The *first* is the possession by the United States of a jurisdiction or right to exercise authority in Bering Sea sufficient to enable it to protect their sealing industries against injury from the prosecution of pelagic sealing by the vessels of any nation. The *second* is the property right or interest in the seal herd, or in the industry of cherishing and cultivating that herd on the Pribilof Islands, and taking the annual increase for the purpose of supplying the world's demand. The treaty apparently assumes that a determination in favor of the United States of the question of jurisdiction in Bering Sea *might* amount to a final disposition of the whole substance of the controversy; but it is cautious in this particular, and, having in view the extreme importance of preserving the seals from threatened extermination, contemplates that even in the event of such favorable decision the United States might not be able, by any exercise of the powers thus conceded to them, to insure this preservation; but that regulations to be adopted by the concurrent action of both nations might be necessary; and this contemplated possibility is not, in the view of the Treaty, displaced by any determination which may be reached upon the question of property.

The seventh article, therefore, broadly provides that:

If the determination of the foregoing questions *as to the exclusive jurisdiction of the United States* shall leave the subject in *such position* that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend, etc., etc.

The reasons for leaving the consideration of concurrent regulations thus broadly open are manifest. In all judicial controversies, except such as plainly involve nothing more than the question of the right to a money payment, the particular relief which may be best suited to the exigency of the case can never be accurately perceived until all the rights, both principal and incidental, are ascertained; and, consequently, the character and extent of the relief are left to be determined along with, or subsequent to, the determination of the merits of the case. This was especially true of the present controversy in the form which it assumed at the time of the Treaty. The questions at that time had received a diplomatic treatment only. This disclosed that several novel legal questions were involved concerning which the high contracting parties were not agreed. But they were agreed that, whatever might be the true solution of such questions, there was one object extremely desirable to both, namely, that the fur-seals should be preserved from the peril of extermination. If it were determined that the United States had no property interest in the seals, and no exclusive jurisdiction in Bering Sea, concurrent regulations would certainly be necessary. And if it were determined that they had no property interest, but had the exclusive jurisdiction, it might yet be that the inadequacy of a protection, however efficiently exerted, which would be limited to these waters, would still render concurrent regulations necessary to complete protection. And, even if it were determined that they had both the requisite jurisdiction and the property interest, there might be a question concerning the action which they might take to protect such interest in the Pacific Ocean, south of Bering Sea. Satisfactory conclusions upon all these questions could only be had by an attentive examination, aided by a full production of proofs, not only of the questions of right, but also of the whole subject of sealing, and of the practical measures which might be requisite to assure the protection which both parties agreed to be supremely desirable. The single event which appears to have been regarded as *possibly* rendering it unnecessary to consider the question of concurrent regulations was a determination that the United States possessed the exclusive jurisdiction in or over some part of Bering Sea. A protection enforced by the United States in the exercise of such an authority *might* be sufficiently effective for the agreed purpose of preservation, and render any concurrent action on the part of Great Britain unnecessary; but this was uncertain. Hence the language of the Treaty, carefully shaped so as not to attempt anticipations

which might be disappointed, made it the duty of the Tribunal, "if the determination of the foregoing questions as to the exclusive jurisdiction of the United States *shall leave the subject in such a position* that the concurrence of Great Britain is necessary to the establishment of regulations," etc., to proceed and "determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary," etc.

The first question which arises here is, what is the scope of the inquiry which the Tribunal is called upon to make? It is to determine what regulations *consistent with the pursuit of pelagic sealing* are necessary? It is thus, or in any other way, limited in its inquiry? It may be urged that we are at liberty to look into the diplomatic communications which preceded the treaty and led to it, with the view of more clearly ascertaining what the precise intent in this and other respects was, and that, when these are taken into view, it appears that all that the United States claimed was that the operations of the Canadian sealers should be placed under restrictions, such as those afforded by a close time and prohibited areas.

It is freely admitted that when suggestions were first made for the settlement of questions growing out of the depredations of the Canadian sealers and the seizures of vessels employed for that purpose, it was believed by the United States that the substantial enjoyment by them of the rights acquired by their acquisition of Alaska from Russia might be secured, and the herds of seals protected sufficiently for that purpose by some scheme of restriction in place or time, or both, of pelagic sealing. And it is believed that the Government of Great Britain at the same time supposed that such restrictions would suffice for the preservation of the herd.

But the whole subject was at that time novel and very imperfectly understood in either country. The cause, pelagic sealing with its results, which gave rise to the complaints on each side was recent, and had not assumed the proportions which it subsequently exhibited, nor was the actual magnitude of it at that time known. Nor had the habits of the seals, their migrations, and the places at which they might from time to time be found, upon which the questions respecting rights of property in them so much depend, been studied and fully ascertained. The United States had, from the first, a conviction that their industry, which came to them as a part of their acquisition from Russia, of cherishing and protecting their seals upon the Pribilof islands, to the end

that they might appropriate to themselves the annual increase without impairing the stock, could not be destroyed by the indiscriminate and unrestricted slaughter of the animal upon the seas. What the precise nature of their right was, and what its limits were, had not been subjected to thorough consideration. That they could prevent marauding upon the islands themselves and in the waters immediately surrounding them, and also any hovering in the neighborhood of them for such purposes, seemed too plain for question. And in view of the circumstance that this industry had been cherished by Russia for half a century, and that the claims to prohibitive jurisdiction over Bering Sea had been for a similar period asserted, and, as was believed by the Government of the United States, for the most part acquiesced in, it seemed to the Congress of the United States a reasonable exercise of natural rights to prohibit the capture of fur-bearing animals in the eastern half of Bering Sea, and laws were enacted by that body designed to effect such prohibition.

These laws were not limited in their operation to citizens of the United States, but might be enforced against the citizens of other nations; and while, by their terms, they assumed to be operative only over the Territory of Alaska and "the waters thereof," their language was interpreted to include so much of Bering Sea as was embraced by the terms of the cession from Russia to the United States. At first there was little, if any, occasion for any attempt to enforce the prohibitions of this legislation against any persons engaging in pelagic sealing. It was not until the year 1886 that this mode of pursuit had been prosecuted sufficiently to attract the serious notice of the United States; but in that year quite a large number of vessels were fitted out for this purpose from Canadian ports on the northwest coast, and entered Bering Sea. Some of them were captured by armed vessels of the United States, and demands for the release of them were made by Her Majesty's Government.

In the discussions which followed those demands, the right of the United States to make such captures was asserted by them and denied by Her Majesty's Government; but the destructive tendencies of the pursuit thus sought to be prevented by the United States was substantially admitted and regarded on both sides as threatening practical extermination of the animals. This would have affected most disastrously the interests of both nations. Both would thereby lose, in common with the world at large, the benefits derived from the useful products of that

animal. And while the United States would be subjected to a particular injury in being deprived of the profit coming from the sealing industries on the Pribilof Islands, Canada, one of the dependencies of Great Britain, would lose the supposed benefit of pelagic sealing; and England would be subjected to the far greater loss which would come from the breaking up of her industry in the manufacture of the seal-skins, in which some thousands of her people were engaged.

These considerations naturally led to the suggestion that both nations possessed such a common interest in the preservation of the herd as to make it expedient for them to make an effort to reach some agreement designed to bring about that result, which, if successful, would not only terminate the existing dispute, but subserve the permanent interests of the parties.

In the absence of full and correct information by the diplomatic representatives of the two governments of the nature and habits of the animal and of the laws governing its reproduction and increase, the peculiar device for the preservation of wild animals by restricting their slaughter to a limited time was suggested, and apparently accepted on both sides, almost immediately, as being likely to furnish a sufficient safeguard against the apprehended destruction. The time during which such a restriction should be enforced, the only point upon which difference of opinion might have been anticipated, was at once agreed upon, and there can be little doubt that a formal agreement would have been immediately framed and ratified, had not Canada, moved, presumably, by the remonstrances of her pelagic sealers, interposed and pressed an objection.¹ It is fortunate, in the view of the United States, that such an agreement was not consummated. It would have proved wholly illusive.

The foundation of this concurrence in the device of a *close season* was the predominating necessity of preserving the animals from extinction; and there is no reason to suppose that, had it then appeared that absolute prohibition of pelagic sealing was requisite to that end, such prohibition would have been acceded to in the absence of remonstrance from Canada, originating in the present interest of persons engaged in pelagic sealing, an interest which regarded with comparative indifference the eventual fate of the animal. It is not to be supposed that the enlightened statesmanship of Lord Salisbury, unembarrassed by any

¹ Diplomatic Correspondence, Case of the United States, Appendix, Vol. I, pp. 175 to 183, inclusive.

difficulty growing out of the opposition of a great dependency of the British Empire, would have insisted for a moment upon a continued indulgence of the pursuit of pelagic sealing, had it appeared that such a course would have involved, in the near future, the practical extermination of the fur-seals. He surely would not have sacrificed the interests of the world and the very large special manufacturing interest of Great Britain, in order to save for a few years a pursuit which was rapidly working the destruction, not only of the great interests above referred to, but also of itself.

The failure of the negotiations referred to left the situation involved not only with the existing dispute, but aggravated by the certainty that fresh causes of irritation and contention would constantly arise; and the proportions of the controversy continued to increase until the peaceful relations of the two governments became most seriously threatened. A renewal of negotiations ensued, which led to the ratification of the Treaty under which the present Tribunal has been constituted. Whatever may have been the effect of the later negotiations in separating the parties more widely upon the main questions of right involved in the controversy, there is one point upon which, having been substantially agreed at first, they were brought more and more into unison, namely, the predominating necessity of preserving the seals. The Seventh Article of the Treaty calls upon the Tribunal to determine simply "what concurrent regulations outside the jurisdictional limits of the respective governments are *necessary* to the proper protection and preservation of the fur-seals." Fitness for the accomplishment of that end is the only description in the Treaty of the regulations which this Tribunal is to ascertain or devise. After the article had assumed its present form in the negotiations, some effort was made by Lord Salisbury to restrict its effect to confer upon the Tribunal the full discretion which its terms import; but this was resisted on the part of the United States, and the attempt was abandoned.¹

The foregoing brief review of the negotiations will serve to show that the authority and discretion of the Arbitrators in respect of concurrent regulations is wholly unrestricted, except by the single condition that they are to be operative only *outside* of the municipal jurisdictions. There is not only no language importing that some form or degree of that pursuit is to be retained, but there is no implication even to that

¹ Diplomatic Correspondence, Case of the United States, Appendix, Vol. I, pp. 339 to 345, inclusive.

effect. It is not said that they are to be regulations *of pelagic sealing*. They are regulations "outside of the jurisdictional limits of the respective governments," and "for the proper protection and preservation of the fur-seal."

We are thus brought to the main question: What regulations are *necessary*? This depends upon a consideration of the nature and habits of the seals, the perils to which they are exposed, the causes which operate to diminish their numbers and prevent their reproduction, and the contrivances calculated to be most effectual to prevent the operation of those causes. It will be at once perceived that such a discussion must be, in great part at least, a simple repetition of that already gone through with upon the question of the claim of a property interest. This comes from the circumstance, which we trust has been made sufficiently manifest, that the institution of property is but the result of the solution by society of very much the same question which we are now proposing to enter upon. Human society has had before itself repeatedly or rather constantly, from its first beginnings, this same question—*what regulations are necessary to preserve the useful races of animals*—and the uniform solution has been to devise and adopt that particular class of regulations, which, taken together and enforced, *constitute the institution of private property* and its attendant safeguards, so far as that expedient is possible and effectual to the end: and it has been found thus possible and effectual in the case of all those animals which voluntarily so far subject themselves to human control as to enable their masters to appropriate the increase without destroying the stock. In respect to those races which can not be subjected to human control the solution has been to devise that class of regulations simply restrictive of slaughter, of which ordinary game laws are the types.

Inasmuch as it is indisputable that the fur-seals of Alaska are animals which submit themselves to human control, so far as to enable the proprietors of the soil to which they resort to take for human use the utmost increase without destroying the stock, the question what *regulations* are necessary for their proper protection and preservation is at once and finally answered. There is but one regulation needed "outside the jurisdictional limits of the respective governments," and that is that all pelagic sealing by the citizens of either nation be absolutely prohibited. Unless the uniform experience of human society from the earliest times in respect to such classes of animals is not likely to be repeated, or unless it seem probable that this Tribunal has the wisdom

and ingenuity to devise other regulations which human society has never as yet been able to conceive, which will effectually counteract the destructive tendency of pursuit by men excited and inflamed by the greed for gain, that regulation must certainly be deemed *necessary*.

We might well dismiss the subject of regulations at this point, as needing no further elucidation, and should do so except for the circumstance that it may possibly be considered that there is still a doubt concerning the extent and degree of the destructive tendency of a method of indiscriminate slaughter such as pelagic sealing is. That it operates directly to diminish the birth rate by sacrificing females instead of males, that it sacrifices large numbers which are never recovered, and that this is unnecessary, because there is a mode of selective slaughter which involves neither of these forms of waste, is undeniable; and, inasmuch as it is conceded by the Joint Report of the Commissioners of both Governments that under this method of capture the seals are diminishing with cumulative rapidity, there seems to be wanting no element requisite to justify the conclusion that this absolute prohibition is necessary. But it may still be contended that this mode of slaughter may, without absolute prohibition, be so restricted as to be compatible with the preservation of the race. This position is *assumed* in the Report of the Commissioners of Great Britain, but no proofs are adduced or reasons offered by them, to make good their assumption.

The first point, therefore, which should engage our attention is whether *any* allowance of pelagic sealing, however restricted in place or time, is compatible with the permanent existence of the seal herd. By the terms "any allowance," we do not mean the least measure of *formal* permission, such, for instance, as would allow the pursuit to be carried on during the months of December and January only, when the seas are so rough, and the seals found with such difficulty that there is no temptation to engage in the enterprise, but such permission as would afford some chance of success, and tempt undertakings that would result in the capture of considerable numbers of seals. Any license more restricted than this would be wholly unimportant as a license, and not worth discussion. It would amount for all substantial purposes to absolute prohibition, and should be viewed as such.

The question to which a clear answer should first be given is, "What *causes* a diminution of the herd?" It might at first be hastily supposed that any killing of seals would work *pro tanto* a decrease of the normal numbers; but a moment's reflection will show that this is not neces-

sarily true. The animal being polygamous, and each male sufficing for from thirty to fifty or more females, we have only to apply common barnyard knowledge in order to learn that under normal conditions there must always be produced a large number of superfluous males, which, if not taken away, would, of themselves, by their fierce and destructive contests for the possession of the females, not only destroy themselves in large numbers, but greatly interfere with and obstruct the work of reproduction. This superfluity of males, therefore, may be taken not only without injury, but with positive benefit to the herd. It is obvious that it is only by *diminishing the birthrate* that the normal numbers of the herd can be injuriously affected. If the seals were not interfered with by man the herd would increase in number, until by the operation of natural conditions tending to restrict increase, and which operate with accumulating force as the numbers become large, such as deficiency of food, want of convenient room on the breeding places, the occupation of the males in destructive warfare among themselves, which must greatly interfere with the work of reproduction, the deaths become equal to the births. The numbers of the herd will, other things being unchanged, then remain constant. This is so clearly explained in the Report of the Commissioners of the United States that it is unnecessary to further enlarge upon it here.¹

Disregarding the causes, other than the interference of man, which may operate to reduce the numbers of the herd, such as killer-whales or other enemies, or insufficiency of food, or disease, matters concerning which we have little or no knowledge, it is manifest that the killing of a single breeding female must, *pro tanto*, operate to diminish the number of births and thus tend towards the destruction of the animal. We need go no further. The conclusion from this single fact is certain and irresistible. Pelagic sealing means the killing, *principally of females and breeding females*; and if practiced to such an extent as to sacrifice such females in *considerable numbers*, must, in proportion to the numbers sacrificed, work a destruction of the herd; and the question when the destruction will be so complete as to amount to a sweeping away of the seals as a subject of value in commerce is a *question of time only*.

It is respectfully submitted to this Tribunal that right here is an end of legitimate debate. Any further discussion must relate to a question *how far man can tamper with the laws of nature* without incurring an injurious penalty. The answer of a tribunal bound to take notice of

¹ Case of the United States, pp. 346-350.

and administer the law of nature should be instant and decisive that he can not tamper with them *at all*. His sole business is to *ascertain* and *obey* them, well knowing, as he does, that any violation of them entails, with the certainty of fate, its corresponding punishment.

But, notwithstanding, let the inquiry *how soon* the destruction would be complete be pursued. And, for this purpose, let it be assumed that the present magnitude of the pelagic catch, and the consequent destruction of females, be continued. That catch amounted in 1891 to 68,000, according to the report of the British Commissioners,¹ and the number of victims dying from wounds and not recovered is not included. If we knew what the number of breeding females in the herds was at the same time, some ground for conjecture would be furnished. But of this we are wholly ignorant. We do not know the numbers even of the whole herd at that or any other time, still less the number of breeding females. All conjectures upon these points are wild and untrustworthy. But there are some facts within our knowledge which throw a certain measure of light upon the inquiry. We know something concerning the average drafts made by the Russians during their occupation of the islands, and which were confined to *nonbreeding males*.

According to the Report of the British Commissioners the average annual draft for the eighty-one years of Russian occupation was 34,000.² But inasmuch as this includes long periods of abstinence made necessary by the depletion of the herd, from exceptional or unknown causes, it would probably be nearer to the truth to place the *usual* draft under the Russian occupancy at from 50,000 to 75,000. And during this period the draft was often made smaller than it might safely have been, by reason of a diminished demand in the market. The smaller number, however, would, obviously, be less favorable to any indulgence of pelagic sealing. We also know that under the more careful management of the United States an annual draft of 100,000 was made without any observed serious diminution of the herd until after pelagic sealing had assumed large proportions. It may, therefore, probably be assumed as reasonably certain that under normal conditions, the herd contains *such a number of breeding females* as will allow an annual taking of 100,000 nonbreeding males, *provided pelagic sealing is prohibited*, and that this draft of 100,000 *is the limit* of nondestructive capture. Taking the pelagic catch of 1891, which was 68,000, there must be added to it the number killed and not recovered; which, as we wish to keep *very*

¹Page 207.²Page 8.

far within the truth, may be taken as one in every four. The number 68,000 represents, therefore, three-fourths only of the total killed, which would thus amount to 68,000 plus 22,666, or 90,666. Of this number, observing the same caution in statement, at least three-fourths are females, which would thus number 68,000, or the number actually recovered. How many of these may be barren females, there is no means of ascertaining. We have no reason to suppose that the number is considerable.

The question whether it would take a long or short period to sweep away the herd if 68,000 females were actually taken from them each year furnishes its own answer. The same annual subtraction from a constantly diminishing sum would be an accelerating progress of destruction which would soon complete its work, *even if all taking of seals on the land were prohibited*. The only cause tending to moderate the rapidity of the destruction would be the increasing difficulty of securing the annual 68,000 with the diminishing number of females; but as this number diminished, the draft would be proportionately larger; and even this check upon the destruction would be done away with by the increasing force employed in the pelagic slaughter, so long as the pursuit held out a chance of profit; and the constantly increasing price of skins—the sure result of a diminution of the supply in the market—would help to stimulate the prosecution of the work.

It is no longer matter of wonder that the much smaller pelagic catch, amounting in 1882 to 12,000, and annually increasing until it amounted in 1887 to 37,500,¹ had produced an effect which became distinctly manifest at the breeding places in 1889 and 1890, by the difficulty of finding the regular number of 100,000 young males for the purpose of slaughter, which led to an order to arrest the further killing. It would be *there* that the invasion upon the numbers of the herd would be first observable. No one could tell from any survey of the whole herd, stretched out over in the aggregate some 10 miles in extent, and presenting differing appearances from time to time, that the numbers had diminished until the diminution had reached an advanced stage; but any considerable decrease in the number of breeding females, involving, as it would, a decrease of births, would soon become manifest in the crucial practical test of selecting the quota of killable young males.²

But counsel for Great Britain may protest that it is not to the pur-

¹ Report of Brit. Com., p. 207.

² Report of Am. Com., Case of the United States, pp. 341-345.

pose to discuss the effects of *present* pelagic slaughter, because everyone concedes that it is destructive and should be restricted. It is true that this is admitted even by the Commissioners of Great Britain, although they assert that the destruction is in part imputable to excessive killing of males upon the islands; but it is none the less proper that, in the inquiry we are now upon, *how soon* a destructive method of capture will result in complete destruction, we should *begin* with a degree of it admitted to be speedily fatal. It tends to simplify the inquiry by drawing attention to the point how far any suggested methods of destruction will arrest this fatal destruction of females.

The problem, of course, is to devise some method of pelagic sealing which will prevent this measure of destruction, or anything approaching it. We must here turn our attention to the methods suggested by the British Commissioners. They have exercised their ingenuity to the utmost upon this point, and if the measures proposed by them are inadequate, we may reasonably infer that no sufficiently effective ones can be devised. The final result of their efforts is embodied in what is termed by them "Specific scheme of Regulations recommended." This is contained in the following paragraphs of their Report:

155. In view of the actual condition of seal life as it presents itself to us at the present time we believe that the requisite degree of protection would be afforded by the application of the following specific limitations at shore and at sea:

(a) The maximum number of seals to be taken on the Pribilof Islands to be fixed at 50,000.

(b) A zone of protected waters to be established, extending to a distance of 20 nautical miles from the islands.

(c) A close season to be provided, extending from the 15th September to the 1st May in each year, during which all killing of seals shall be prohibited, with the additional provision that no sealing vessel shall enter Behring Sea before the 1st July in each year.

156. Respecting the compensatory feature of such specific regulations, it is believed that a just scale of equivalency as between shore and sea sealing would be found, and a complete check established against any undue diminution of seals, by adopting the following as a unit of compensatory regulation:

For each decrease of 10,000 in the number fixed for killing on the islands, an increase of 10 nautical miles to be given to the width of protected waters about the islands. The minimum number to be fixed for killing on the islands to be 10,000, corresponding to a maximum width of protected waters of 60 nautical miles.

157. The above regulations represent measures at sea and ashore sufficiently equivalent for all practical purposes, and probably embody or provide for regulations as applied to sealing on the high seas as stringent as would be admitted by any maritime power, whether directly or only potentially interested.¹

¹Report of Br. Com., p. 25.

The first observation in relation to this suggested scheme which we have to make, is that it begins with a restriction, not upon *pelagic* sealing, but upon the taking of seals upon *the Pribilof Islands*, proposing a restriction of that to 50,000 annually. This is wholly inadmissible. Whatever the distinguished Commissioners may think proper or desirable in the way of restriction upon the action of the United States upon its own soil, it never occurred to the Government of Great Britain to ask that that nation should submit the exercise of its sovereign power to the authority of any tribunal; nor have we any reason to suppose that the diplomatic representatives of Great Britain, at any time in the course of the negotiations which resulted in the Treaty, imagined that any admissible scheme of regulations could embrace a limitation upon the killing of superfluous males upon the land, to the end that females might be killed upon the sea. It is enough to say that the Treaty strictly confines the regulations which the Tribunal may consider to such as are "outside the jurisdictional limits of the respective governments."

But let this pass in the present discussion, for we desire to consider the sufficiency of the proposed regulations upon the face of them. In substance, the scheme purports to be, so far as pelagic sealing is concerned, a mere interposition of *additional difficulties* in the prosecution of it by restricting it in place and time. It establishes a prohibited zone, with a radius of 20 miles from the islands, confines all pelagic sealing to the period between the 1st of May and the 15th of September in each year, and forbids entrance into Bering Sea before the 1st of July in any year. There are several observations immediately suggested by this scheme, which is declared by the contrivers of it to afford "the requisite degree of protection."

(1) In the first place it does not purport to restrict the number of seals so killed at sea to less than 68,000, unless the killing of that number is practically impossible under the conditions imposed. What guaranty or assurance is there that 68,000 females will not still be slaughtered under the limited conditions? All that is requisite to this end is the employment of an additional force of vessels and men, and this is easily possible, and will certainly be supplied if the *price of skins* will justify it. We know this would be the case, for it must be taken as certain that the force of pelagic sealers would be largely increased at the price

which skins commanded in 1891, when 68,000 were taken at sea. The force had been steadily increasing for years, and there is no reason for a belief that the progress would have ceased. Men will eagerly engage in such pursuits long after the certainty of a profit disappears. It still has great prizes, and it is these which tempt enterprise and risk. More than this, the scheme scarcely interposes any additional difficulties. It cuts off very little of the *time* during which pelagic sealing is now or can be prosecuted with advantage. A very small additional force would suffice to raise the capture to the amount obtainable by the present force operating without restriction.

But, finally, and decisively, the scheme itself furnishes a cause certain to bring to the work of destruction a force which would carry the slaughter far beyond the limit even of 68,000 females *per annum*. It cuts off from the market the supply from the breeding islands of 50,000 skins, leaving that enormous deficiency to be supplied by the pelagic sealers! What greater boon could they ask? If these Commissioners had deliberately set about to contrive a project for the stimulation of pelagic sealing, and for the delight of those engaged in it, they could have devised nothing so well calculated for that end as to take out of the market 50,000 skins of the supply from the Pribilof Islands, when the price stands at 125 shillings per skin,¹ and give the pelagic sealers a chance to make up the deficiency between the 1st of May and the 1st of September, with the privilege of entering Bering Sea on the 1st of July, and of approaching the Pribilof Islands to a distance of 20 miles therefrom. Indeed, with such temptations, they would greatly increase the catch over present limits, even if they were excluded from Bering Sea altogether. Their catch in the North Pacific during the present year has, it is believed, amounted to nearly that.

But we must not do the Commissioners the injustice of confining criticism to a part of their scheme. It includes another feature of restriction, which is indicated as furnishing "a just scale of equivalency as between shore and sea sealing," and "a complete check against undue diminution of seals." This is that the United States may procure an addition of ten nautical miles to the radius of the zone of protection around the islands for each reduction of 10,000 below the maximum of 50,000 to be allowed to be killed upon the islands, so that a protected zone of a radius of 60 miles might be obtained by a volun-

¹Case of the United States, Appendix, Vol. II, p. 561.

tary reduction of the number to be taken on the islands to 10,000. Of course, with a further withdrawal from the market of the supply furnished by the islands, to the amount of 40,000 skins annually, that is to say, by leaving practically the *whole* market to be supplied by the pelagic sealers, a force in the shape of vessels and men would speedily show itself sufficient to slaughter, not 60,000 females a season, but 100,000, and even more, between the first of May and the 15th of September. But we fail to perceive the use, or the consistency, of imposing a limit to which such voluntary reductions of slaughter on the breeding islands should be carried by making the minimum 10,000. Why should the United States not be permitted, if they desired, to purchase a protected zone of 60 miles radius by giving up the right to slaughter a single seal? The scheme had as its sole merit some poor pretension in the way of comicality. Why should this be thrown away?

(2) We may be told that we are really, if not avowedly, imputing to these Commissioners an *intention* to protect and promote the interests of the Canadian sealers, and that this is unfair; that if they are laboring in behalf of pelagic sealing, they are working as much for the interest of citizens of the United States as for Canadians, inasmuch as pelagic sealing is as open to the former as it is to the latter. We do not forget the suggestion of the Commissioners to this effect,¹ and we remember at the same time, what was well known to them, that this occupation is not unreservedly open to citizens of the United States. That nation deems itself bound by the spirit and principles of the law of nature, holds itself under an obligation to use the natural advantages which have fallen to its lot, by cultivating this useful race of animals to the end that it may furnish its entire increase to those for whom nature intended it, wherever they dwell, and without danger to the stock. It holds, as the law of nature holds, that the destruction of the species by barbarous and indiscriminate slaughter is a *crime*, and punishes it with severe penalties. Its enactments adopted when it was supposed that the only danger of illegitimate slaughter was confined to Bering Sea were supposed to be adequate to prevent all such slaughter. Are the United States to be deprived of the benefit of the seals unless they choose to abandon and repudiate the plain obligations of morality and natural law?

¹ Report of Br. Com., p. 20.

(3) But what would be the *cost* of this scheme? *Some*, not indeed very large, additional difficulties would be interposed in obtaining the present pelagic catch of 68,000. It would require a somewhat larger investment of capital in vessels and appliances, and a somewhat greater expenditure in wages. This, as has been shown, would be fully reimbursed to the sealers, with a large additional profit, by means of the subtraction from the market of 50,000 skins now furnished from the Pribilof Islands, and the consequent increase of *price*. This increase of price must of course be paid by the *consumer*. We can not well conjecture the amount of it. It could hardly be less, if we may rely upon the teachings of the table of prices,¹ than \$10 per skin, and might amount to much more. This additional cost, increased at every stage in the process of manufacture and exchange, might easily add \$30 to the price of the skin when it comes to the consumer, and thus the world would be burdened by an additional charge for 100,000 skins to the amount of the easily possible sum of \$3,000,000. And what would it cost to maintain the *naval police* required to enforce this scheme? How many armed steamers would be needed to guard effectually against the entrance of a trespasser within a prohibited zone, the circumference of which is upwards of 140 miles, in a region of thick and almost perpetual fogs? A million of dollars annually would be a moderate estimate of the expenditure required, and this must be paid by somebody, the Commissioners do not tell us by whom.

And *for whom* and *for what* is this prodigious tax to be imposed? For the Canadian sealers alone, and in order to enable them to make a profit, for a few short years, by the total destruction of a race of useful animals! If the assumption of such a burden were necessary, in order to *preserve* the seals, the propriety of making it would be worthy of consideration; but it is absolutely no misrepresentation or exaggeration to say that it would be a price paid, not for their preservation, but for their more speedy extermination. Not a dollar of this enormous expenditure is needed for any useful purpose. The entire increase of all the herd may be made available at the lowest possible price, without endangering the stock and without imposing any additional burden upon the world, by simply confining the capture of the seals to the methods allowed by natural law. Nor is the expenditure needed even for the mischievous purpose of killing off the seals. It is indeed a contrivance by which that result would be hastened, but if nothing were

¹Case of the United States, Appendix, Vol. II, p. 561.

done, and pelagic sealing were permitted to be prosecuted without let or hindrance, the end would be reached nearly as soon.


(4) The severity, amounting to injustice, in the operation of such a scheme would be worth commenting upon, were it on other grounds admissible. How would the sealer know, in that region of fog, whether he was inside or outside of the prohibited line? The opportunities for taking observations are rare. It may be said that he should take good care and give the line a wide inside berth. But laws should take notice of the weakness of men in the face of temptation. This scheme would be a lure to which many would yield, and find themselves caught, even when they intended not to transgress.

(5) The Commissioners of Great Britain have in their report studiously avoided the real problem, which it was their business to solve. That problem, according to their own view, was to devise some scheme of pelagic sealing which would preserve that pursuit, and at the same time not be fatally destructive to the herd of seals. True, this is impossible; but it was not so in their view, if we may credit their confident statements. They should, therefore, have first fixed upon *some definite number of females* which might be taken annually without initiating a gradual, but sure, destruction, and then devise a method which should restrict the capture to this number. This is the method pursued upon the Pribilof Islands. An estimate is made of the number of superfluous males that may be safely taken, and the annual draft is rigidly limited to that number. Had the Commissioners attempted this task, the utter impossibility of it would have stood self-exposed. They would have been immediately confronted with *two* refutations. In the first place, had they named 50,000, or 40,000, or 20,000, or even 10,000, females as a number which might be annually sacrificed without involving a sure destruction, the sure teachings of the natural laws governing the increase of such animals would at once have rejected the proposal.

Those laws tell us that *no* females must be taken. It is not from that quarter that man may make his drafts in *any* degree. The conditions are far more rigidly exacting than in the case of domestic cattle. *There* the opportunity for cultivation is unlimited. It may be prosecuted throughout the whole world, and an undue abundance be speedily produced. It is often necessary there to *keep down* the stock instead of increasing it, and therefore females must necessarily be taken to

some extent; but with the seals the case is far otherwise. There are but few *possible* places in which the animal may be cultivated, and the march of destruction has greatly reduced these. They are wholly insufficient to supply the demand even under the most careful and prudent husbandry, and any taking whatever from breeding females is plainly inadmissible. This is of itself an end of the question, for to say that pelagic sealing must be limited to a catch of 10,000 (and, as we have seen, in pelagic sealing the number of females killed equals the whole number of both sexes actually recovered) is to prohibit it. The game would no longer be worth the candle. It would not be pursued under such conditions. In the next place, had the Commissioners fixed upon any definite number, it would be absolutely impossible to frame any scheme by which the slaughter could be limited to it. Their own wretched device of a limitation of the pursuit in time and place, much better calculated to increase than to restrict the slaughter, is, of course, beneath attention. We do not refer to the inefficiency of their particular suggestions. There is an inherent impossibility which no ingenuity, combined with a supreme desire to accomplish the purpose, can surmount.

(6) The fundamental error of the Commissioners of Great Britain, as of all who either deceive themselves, or attempt to deceive others, with the illusion that it is possible to permit in any degree the indiscriminate pursuit of a species of animals like the seals, so eagerly sought, so slow in increase and so defenseless against attack, and at the same time to preserve the race, consists in assuming that the teachings of nature can be replaced by the cheap devices of man. The first and only business of those who, like the Commissioners, were charged with the duty of ascertaining and declaring what measures were *necessary* for the preservation of this animal was to calmly inquire what the laws of nature were, and conform to them unhesitatingly. It would then have been seen by them that *no capture whatever* of such animals should be allowed except capture *regulated* in conformity with natural laws; and that all *unregulated* capture was necessarily destructive, and a crime; that there could be regulated capture upon the land, and upon the land alone, and that all attempts to regulate capture on the sea must necessarily be abortive; that, consequently, the only regulation to be made in respect to pelagic sealing was to prohibit it altogether, which is tantamount to the award of property to the proprietors of the breeding



grounds. The attempt to apply regulations in the nature of game laws to the pursuit of such animals is a misdirected effort, founded upon a disregard of their nature and habits. They are not like wild ducks, or herring, or mackerel, animals over which man has no control, and which reproduce themselves in prodigious numbers, and have abundant means of eluding pursuit, and which can not be cultivated by art and industry; but a species exhibiting all the conditions requisite to property, and which must be treated accordingly.

(7) This error is not imputable to ignorance on the part of the Commissioners. It does not arise from any failure to take notice of the nature and habits of the animal. There is, indeed, in their report an avoidance, which appears to be industrious, of any special inquiry into the nature and habits of seals, with the view of ascertaining and reporting for the information of this Tribunal whether they really belong to that class of animals which are the fit subjects of property, or that of which ownership can not be predicated, and which can, consequently, be protected against excessive sacrifice, only by the rough and ineffective expedient of game laws; but, nevertheless, they fully admit that perfectly effective regulation of capture is easily possible at the breeding places and there alone. They say:

116. It is, moreover, equally clear from the known facts that efficient protection is much more easily afforded on the breeding islands than at sea. The control of the number of seals killed on shore *might easily be made absolute*, and as the area of the breeding islands is small, it should not be difficult to completely safeguard these from raiding by outsiders, and from other illegal acts.¹

What is the avowed ground, aside from the assumed right of individuals to carry on pelagic sealing, upon which these Commissioners felt themselves not warranted in yielding to the decisive facts thus stated by them, and declaring that a perfect protection would be given to the seals by simply prohibiting capture at sea? It is, to shortly sum it up, that the power thus possessed by the occupants of the breeding places has been abused in the past, and probably will be in the future, by an excessive slaughter of young males. It is that the United States put the property into the hands of lessees, and that, although the leases are long ones, yet the lessees are so far barbarians, or children, that they are incapable of comprehending their own interests,

¹ Report of Br. Com., p. 19.

and incapable of restraining their desire for present enjoyment, in order to secure their permanent welfare; and that the United States Government, which has a supervising control, either from the same or some other unexplained reason, is equally incapable of protecting its own interests and discharging its duty to mankind by preserving those bounties of nature which have been intrusted to its keeping. In short, their argument is that those means which nature has pointed out, and which society from the earliest dawn of civilization has adopted and followed, for the purpose of preserving the gifts of nature and making them in the highest degree available for the uses of man, have, in this instance, proved a failure; that the force of the universal motive of self-interest has, in this instance, not been effective with the American people, and consequently an occasion has arisen for the invention, by the wisdom and ingenuity of these Commissioners, of some device better adapted to the desired object! This is no perversion or exaggeration of the argument of this report. It may be left to fall from its intrinsic weakness, not to say absurdity.

(8) We are reluctant to make any reference to *motives*; but, where opinions are, as in this case, *made* evidence, the question of good faith is necessarily relevant. Why is it that these Commissioners have chosen to disregard the plain dictates of reason and natural laws which they were bound to accept, and to recommend some cheap devices in their place, when they so clearly perceived those dictates? We are not permitted to think that this was in *conscious* violation of duty, if any other explanation is possible. The only apology we can find comes from the fact, clearly apparent upon nearly every page of their report, that the *predominating* interest which they conceived themselves bound to regard was not the preservation of the seals, but the protection of the Canadian sealers. This explanation at once accounts for all their extraordinary recommendations and all their varying inconsistencies. Hence every degree of restraint upon pelagic sealing is reluctantly conceded, and yielded only when it is compensated for, and more than compensated for, by an added restriction of the supply furnished to the market from the breeding islands. As the work of the pelagic sealers is on the one hand restricted in time or place, and thus *discouraged*, it is on the other *stimulated* by the certainty of a better market and a richer reward. So persistently and exclusively have they kept this policy before them as their main object, that an *ideal* has been

formed in their minds which they openly avow, and to attain which is their constant effort. This ideal is that *all* taking of seals on land should be prohibited, and pelagic sealing be made the only lawful mode of capture.

They thus express themselves: "It has been pointed out, and we believe it to be probable, that if all killing of seals were prohibited on the breeding islands, and these were strictly protected and safe-guarded against encroachment of any kind, sealing at sea *might be indefinitely continued without any notable diminution*, in consequence of the self-regulative tendency of this industry."¹

And, suggesting, as the only objection to this policy which occurs to them, that it might be too much to expect of the United States to thus guard the islands and support a native population of 300 at its own expense, they continue: "It may be noted, however, that some such arrangement would offer, perhaps, *the best and simplest solution of the present conflict of interests*, for the citizens of the United States would still possess equal rights with all others to take seals at sea, and in consequence of the proximity of their territory to the sealing grounds they would probably become the principal beneficiaries!"²

And they finally come to the conclusion that *any* taking of seals at the breeding places is an *error* for which there is no defense except long usage, and even that they regard as a doubtful apology. They say:

While the circumstance that long usage may, in a measure, be considered as justifying the custom of killing fur-seals on the breeding islands, many facts now known respecting the life history of the animal itself, with valid inferences drawn from the results of the disturbance of other animals upon their breeding places, as well as those made obvious by the new conditions which have arisen in consequence of the development of pelagic sealing, point to the conclusion that the breeding islands should, if possible, remain undisturbed and inviolate.³

These references to the opinions expressed in the report of the Commissioners of Great Britain, when taken together with the scheme recommended by them, leave no room for doubt that the defense of the Canadian sealers was, from first to last, their *predominating motive*, and enable us to make for them the apology that they conceived that this was the duty with which they were especially charged. If this be the fact, it is easy to perceive how all their reasonings and recommendations should receive a color and character. We feel obliged to say that

¹ Report of Br. Com., p. 20, sec. 121.

² Report of Br. Com., p. 20, sec. 125.

³ Report of Br. Com., p. 27, sec. 166.

we can perceive no other ground upon which their action may be made consistent with good faith.

(9) But what are their avowed reasons, if any, for forming this *ideal* of an exclusive adoption of pelagic sealing as a proper scheme of regulations for preserving the seals? We can gather from the pages of their report these three:

(a) That pelagic sealing is a national or common *right*, which can not be taken away.

(b) That pelagic sealing has a "self-regulating tendency."¹

(c) That sealing on the breeding places is destructive, because of the excessive slaughter of young males, which, as they allege, is and will be indulged in, although it need not be.

The first of these reasons is not relevant here, nor should it have had any place in the consideration of these Commissioners. It was a matter committed to the determination of other parties, and is elsewhere discussed by us. It may, however, be here observed that if it be a natural right of citizens of Great Britain, it must be held, as all other rights are, in subordination to the power of governments to enact legislation to preserve the useful races of animals, and Great Britain may certainly, if she pleases, prohibit her citizens from exercising it, as the United States do. And if it be the subject of governmental restriction, as the commissioners themselves propose to make it, it may be also prohibited by governmental regulation.

The third ground we have already considered. Unfounded in fact, repugnant to reason, absolutely contradicted by the experience of nearly a century on the Pribilof Islands, and, as the Commissioners themselves admit, by that on the Commander Islands for a similar period,² we dismiss it without further notice.

The *second* ground, the alleged "self-regulative tendency," may be briefly noticed. What is this asserted "*self-regulating tendency*?" We must describe it in the language of the Commissioners themselves. They say:

"In sealing at sea the conditions are categorically different, for it is evident that by reason of the very method of hunting, the profits must decrease, other things being equal, in a ratio much greater than that

¹ Report of Br. Com., p. 20, sec. 121.

² Report of Br. Com., p. 15, sec. 92.

of any decrease in the numbers of seals, and that there is, therefore, inherent an *automatic principle of regulation* sufficient to prevent the *possible destruction of the industry* if practiced only at sea."¹

But what if *other things* should *not* be equal, as they certainly would not be? What if, as the supposed difficulties in capturing seals were increased, making it impossible for the same force to make the same catch in the same time, and thus diminishing the supply offered in the market, the price of skins should rise, as it certainly would? Would the effect be anything except to stimulate the pursuit, bring into play a greater energy and skill, attract a larger force, and thus lead to an equal, and probably a much larger catch? In the whale fishery the price of the product continually rising so stimulated the pursuit as to attract a continually augmenting force, with the result of nearly exterminating some of the species. The fate of the sea otter had been the same. But we need not go further than the statistical tables of pelagic sealing furnished by the Commissioners. Whatever may have been the increase of difficulty in obtaining seals consequent upon the increased pursuit, the price has afforded a stimulus sufficient to bring into the field a continually augmenting force, and has thus brought the aggregate of the pelagic catch from 12,000 in 1882 to 68,000 in 1891.

(10.) In conclusion it is submitted that the scheme proposed by the Commissioners of Great Britain is a contrivance, *not* for the *preservation* of the seals, which was by the Treaty made the sole object of their inquiries and labors, but for *the promotion of pelagic sealing*, and, consequently, for the *destruction* of the seals. This is its character even upon their own views. They insist that the slaughter of 100,000 young *males* upon the Probilof Islands was, even before pelagic sealing was prosecuted, an excessive draft rapidly tending to a destruction of the herd; and yet their scheme directly and necessarily involves a slaughter of many more than 100,000 seals of which more than half will be *females*.

It is believed that the Tribunal will not fail to perceive that a thorough consideration of the question of the feasibility of any system of regulating pelagic sealing which would permit that business to be prosecuted, and yet secure the herd from extermination, ending, as it must, in a conviction that such a system is not feasible, leads, by a somewhat different path, to the same conclusion which is reached by a

¹ Report of Br. Com., p. 19, sec. 118.

direct inquiry into the question of property. It fully establishes the conclusion that the only "concurrent regulation" which can preserve the seal herds from practical extermination is one simply and absolutely prohibitive of pelagic sealing, and that this therefore is necessary. And this is tantamount, in its effect, to the recognition of a property interest in the proprietors of the breeding islands.

If a *bona fide* effort were made to allow pelagic sealing under conditions which would reduce its destructive effect to a point where it might be neglected as unsubstantial or insignificant, *real, not pretended*, restriction would be secured. The effort would be to *take away*, not to *add*, inducements to embark in it. The method would be to *discourage* it, to throw *difficulties* in the way of it, to so restrict it in place or time, or both, that little chance for profit would remain. To this end a prohibition during March and April would be wholly useless. It could not be safely allowed even for a single month in the period from April to October. The privilege must be limited to stormy weather which repels enterprise. And this is to prohibit. If we mean to preserve the seals, we must submit to be governed by those natural laws upon an observance of which their preservation depends. These teach, with a directness and certainty which can not be misunderstood, two things.

First. In the case of animals over whom man has no control, such as most wild animals are, if they are in danger of destruction from too eager pursuit, restrictions in the nature of game laws, which operate simply to diminish the destruction, without changing its character, are the only preventive measure which society can apply. And it can not absolutely prohibit destruction, for this would be to prohibit the *use* of nature's gift. This remedy is apt to be insufficient, from the difficulty of enforcement, but it tends to preserve, and sometimes succeeds in preserving, that which it is designed to save.

Second. But where some men have such a control over the animal that they can by abstinence, art, and industry reap its full natural increase and make it available for human wants, and at the same time preserve the stock, society can, as it does, preserve the animal, and at the same time secure the full benefit of its natural increase by permitting them to kill at discretion, and prohibiting killing by all others.

The United States stand upon the assertion of their property interest, and if that is recognized, they conceive that they have the ability to protect it on every sea. It is not usual for one nation to voluntarily

ask the aid of another in the defense of its rights. Each is ordinarily left to enforce its own laws with its own power. The United States do not ask for the slightest measure of aid in the performance of what is properly their own exclusive work.

But it may happen, and does happen in the present case, that what from natural situation may be peculiarly the proper work of one nation, may yet be the work, in some degree, of others. The destruction of a useful race of animals is the destruction of property belonging to the whole world, and is a crime against the law of nations. To prevent and punish it is as distinctly the duty of all civilized nations as it is to prevent and punish the crime of piracy. The pelagic sealer is *hostis humani generis*, just as the pirate is, though with a less measure of enormity and horror. It is, therefore, part of the duty of nations to forbid their citizens from engaging in the practice of pelagic sealing, and, as the parties to this controversy have voluntarily submitted it to this Tribunal to declare what regulations outside of their respective jurisdictions it is their duty to concur in and enforce for the preservation of the seals, it is entirely proper that the tribunal should frame, even while recognizing the property interest asserted by the United States, a simple regulation, to be concurrently adopted and enforced by each nation, prohibiting all sealing at sea, except by the native tribes of Indians on the northwest coast of America for the purposes of food and clothing in the manner in which they were originally accustomed to prosecute it.

JAMES C. CARTER.

FIFTH.

CLAIMS FOR COMPENSATION.

I.—DAMAGES CLAIMED BY THE UNITED STATES.

It is provided in article VIII of the Treaty that either party may submit to the Arbitrators any question of fact involved in any claim it may have against the other; and ask for a finding thereon, "*the question of the liability of either government upon the facts found to be the subject of further negotiation.*"

As the undersigned construes this paragraph, it limits the range of inquiry by the Tribunal to facts which bear only upon the amount of the claims submitted, as the question of *liability* is left open to be settled by negotiation.

And in the fifth article of the *Modus Vivendi* of May 9, 1892,¹ it is provided that—

If the result of the Arbitration be to affirm the right of British sealers to take seals in the Bering Sea, within the bounds claimed by the United States under its purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the Arbitration, upon the basis of such a regulated and limited catch or catches as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal herds; and, on the other hand, if the result of the Arbitration shall be to deny the right of British sealers to take seals within said waters, then compensation shall be made by Great Britain to the United States (for its citizens and lessees) for this agreement to limit the island catch to 7,500 a season, upon the basis of the difference between this number and such larger catch as, in the opinion of the Arbitrators, may have been taken without an undue diminution of the seal herds.

This leaves the number of seals which might have been taken in the Bering Sea by the British sealers, and upon the Pribilof Islands by the lessees of the United States, without danger of reducing the seal herd, wholly to the judgment of the Tribunal under the proofs submitted.

¹Case of the United States, Appendix, Vol. I, p. 7.

In the printed Case submitted on behalf of the United States, claim is presented under the clause last quoted, for compensation to the United States for the increased amount of rental which the United States would have received upon an additional number of skins taken and for a bonus of \$9.62½ on each skin, to be paid by the lessees of the islands, over and above the bonus upon the 7,500 skins, which are permitted to be taken under the *Modus Vivendi*.¹ And a claim is also submitted by the United States in behalf of its lessees for the profit the lessees would have made upon an increased number of seals which might have been taken above the 7,500 but for the *Modus Vivendi*.²

The Case also submits a claim in behalf of the United States and lessees for compensation for the limited number of seals taken under the *Modus Vivendi* of 1891.

Frankness requires us, as we think, to say that the proofs, which appear in the Counter Case of the United States as to the condition of the seal herd on the Pribilof Islands, show that the United States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *Modus Vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the Tribunal to the proofs, and submit the questions to its decision.

As to the claims submitted in behalf of the United States and its lessees under the *Modus Vivendi* of 1891, the undersigned also feels constrained to say that, as no provision for the payment of compensation to either party is provided for in that agreement, and as, under the laws of the United States and lease of the islands by the United States to the North American Commercial Company, the United States had the full power, through its Secretary of the Treasury, to limit the catch in any year to such number as in the discretion of the Secretary of the Treasury might seem proper, we must admit that no right of compensation accrued under that agreement to either the United States or its lessees for the reason that the agreement was wholly voluntary, and such as the two governments were entirely competent to make, and no right to compensation would accrue to either government or its citizens unless specially provided for in the *Modus Vivendi*.

¹ Case of the United States, pp. 286-289.

² *Ibid.*, pp. 289-291.

II.—DAMAGES CLAIMED BY GREAT BRITAIN.

The claims submitted on the part of Great Britain are for damages sustained by certain of its subjects by reason of the seizure by the United States of certain vessels alleged to belong to such subjects, and warning certain British vessels engaged in sealing not to enter Bering Sea, and notifying certain other British vessels engaged in the capture of seals in Bering Sea to leave said sea, whereby it is insisted that the owners of such vessels sustained losses and damages, as set forth in the respective claims, these claims being stated in detail in the "*Schedule of particulars*" of said claims appended to the British Case.

The right and authority of the United States to protect the seal herd, which has its home in the Pribilof Islands, and in the exercise of such right to make reprisal of seal-skins wrongfully taken, and to seize, and, if necessary, forfeit the vessels and other property employed in such unlawful and destructive pursuit, is a necessary incident to the right asserted by the United States to an exclusive property interest in said seals and the industry established at the sealeries.

We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this Tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

And, even if it shall be decided by this Tribunal that the United States were not justifiable, under the circumstances and the law, in making such seizures and interfering with British subjects in the pursuit and capture of fur-seals in the Bering Sea, still that decision would furnish no ground for claims based on wholly illegal and untenable grounds, nor for extortionate demands.

The actual damages sustained by these British subjects, in behalf of whom these claims are presented by the British Government, must, undoubtedly, be finally settled, according to the terms of the Treaty, by negotiations hereafter to be had; but, as findings of fact in regard to these claims are asked for, our purpose in this part of the argument is to call attention to some of the elements which go to make up these claims, and show, as we think, conclusively, that such elements can

not enter into claims for compensation against the United States under the Treaty.

And we contend—

First. That only claims properly due to *subjects of Great Britain* should be submitted on the part of that nation and findings of facts asked in relation thereto; and in the application of this principle we insist that it is shown by the Counter Case of the United States and the Appendix thereto that the schooner *W. P. Sayward* and the steam schooners *Thornton*, *Anna Beck*, *Grace*, and *Dolphin*, with all their supplies and outfits, were in fact owned by one Joseph Boscowitz, a citizen of the United States at the time these vessels were respectively seized by the United States officers;¹ that for some time prior to the fall of 1885 said schooner and steam schooners had been engaged in the sealing business in the joint interest of said Boscowitz and one James Douglas Warren; that Warren had no capital, and although nominally interested in said vessels and their catch as half owner, yet in fact the money representing his share in the vessels was loaned to him by Boscowitz, and secured by mortgages to Boscowitz on the vessels; that in the fall of 1885 Warren became insolvent and made an assignment for the benefit of his creditors, and in order to transfer the title to these vessels a sale of them was made under the Boscowitz mortgages, and one Thomas H. Cooper bid the vessels off at such sale for the sum of \$1, Cooper being a brother-in-law of Warren and a British subject, residing in San Francisco, Cal.; that on becoming such purchaser Cooper executed mortgages to Boscowitz on the vessels for their full value, which mortgages Boscowitz held at the time of the seizures, the whole transaction being had solely for the purpose of securing a British registration for said vessels, and thereby enabling Boscowitz and Warren to carry on the sealing business under the British flag.²

The testimony showing Boscowitz was a citizen of the United States is found in the affidavits of T. T. Williams³ and a report of Levi W. Myers, United States consul at Victoria, B. C., dated November 10, 1892.⁴ While the proof as to the relations between Boscowitz and Cooper is found in the deposition of Thomas H. Cooper, the alleged

¹ Counter Case of the United States, p. 30; App., pp. 255, 351.

² Counter Case of the United States, App., pp. 321-325.

³ *Ibid.*, p. 351.

⁴ *Ibid.*, p. 255.

owner of the said vessels;¹ and the relations between Boscowitz and Warren are shown in the testimony of Boscowitz and Warren, and the pleadings and decrees in the case of Warren *vs.* Boscowitz and the cross case of Boscowitz *vs.* Warren, in the courts of British Columbia.²

The proof also shows that the schooners *Carolina* and *Pathfinder*, with their supplies and outfits, were, in fact, owned at the time they were seized by one A. J. Bechtel, a citizen of the United States (see deposition of W. H. Williams,³ and a report of Levi W. Myers, United States consul at Victoria, B. C.⁴), although said vessels were registered in the names of British subjects.⁵

And that the schooners *Alfred Adams*, *Black Diamond*, and *Lily*, were in fact owned, at the time they were respectively seized by one A. Frank, a citizen of the United States (see deposition of T. T. Williams),⁶ although registered in the names of British subjects.⁷

It will be seen by looking over the list of vessels alleged to have been seized, or interfered with, that the list contains twenty vessels, but that two of the vessels named in that list, the *Triumph* and the *Pathfinder*, were seized or interfered with twice;⁸ so that, in fact, the schedule contains the names of only eighteen separate vessels in regard to which claims are made, and of these eighteen, ten of them were owned by citizens of the United States.

It is assumed on the part of the United States that if the proof submitted shows that these ten vessels were really the property of citizens of the United States, although they had a nominal registry in the names of British subjects, such demonstration will be sufficient to justify a finding by the Tribunal that no citizen of Great Britain has sustained damage by the seizure of the *Sayward*, *Anna Beck*, *Thornton*, *Grace*, *Dolphin*, *Carolina*, *Pathfinder*, *Alfred Adams*, *Black Diamond*, and *Lily*.

We therefore confidently ask and expect the decision and finding of the Tribunal that these claims do not belong to British subjects, and

¹ *Ibid.*, pp. 320-325.

² *Ibid.*, pp. 301-320.

³ Counter Case of United States, Appendix, p. 351.

⁴ *Ibid.*, 261.

⁵ Case of Her Majesty's Government, Schedule of Claims, pp. 1, 40; Counter Case of United States, Appendix, p. 256.

⁶ Counter Case of United States, Appendix, p. 352.

⁷ Case of Her Majesty's Government, Schedule of Claims, pp. 32, 48, 50.

⁸ *Ibid.*, p. 1.

for that reason the Tribunal can not be called upon to find any facts respecting them.

To justify a finding upon a claim, it must be made to appear affirmatively, by a clear preponderance of proof, that the claim is owned by one of the Governments, parties to this Arbitration, or to a citizen or subject of such Government.¹

We insist that we may, with propriety, go farther and say that, if there is even doubt that a claimant is a citizen of the nation that presents a claim in his behalf, that doubt should of itself be enough to preclude any finding of facts involved in such claim.

The powers and jurisdiction of this Tribunal are delegated to it by the Treaty which is in itself but a contract or agreement and its terms can not be enlarged or amplified by construction.

In taking this ground we do not intend to cast any aspersion upon the good faith of the British Government, or its Agent, for having presented these claims, as we admit that on the face of the claims as presented they appear to be in favor of British subjects. But we do insist that it is right for this Tribunal to go behind the face of the papers and ascertain, from proofs furnished, whether or not the persons to be benefited by the allowance or payment of these claims are in fact British subjects, and that no facts should be found involved in any claim where there is even good ground for doubt that such claim belongs to a British subject.

Second. All these claims but two (the *Triumph*, No. 11,² and the *Pathfinder*, No. 20,³ of schedule) contain an item for "loss of probable catch," "loss of estimated catch," "balance of probable catch," "probable catch," etc.⁴

All of which will more fully appear by the following tabulated statement:

No. 1. <i>Carolina</i> , estimated catch	\$16,667
No. 2. <i>Thornton</i> , estimated catch	16,667
No. 3. <i>Onward</i> , estimated catch	16,667
No. 4. <i>Favorite</i> , estimated loss of catch.....	7,000
No. 5. <i>Sayward</i> , probable catch of 1887.....	19,250
No. 6. <i>Grace</i> , probable catch.....	23,100
No. 7. <i>Anna Beck</i> , probable catch.....	17,323
No. 8. <i>Dolphin</i> , probable catch.....	24,750

¹ Article VIII of Treaty of Arbitration.

² Case of Her Majesty's Government, Schedule of Claims, p. 36.

³ *Ibid.*, p. 57.

⁴ *Ibid.*, pp. 1-56.

No. 9. <i>Alfred Adams</i> , probable catch.....	\$19,250
No. 10. <i>Ada</i> , probable catch.....	15,818
No. 12. <i>Juniala</i> , estimated catch.....	9,424
No. 13. <i>Pathfinder</i> , estimated catch.....	15,363
No. 14. <i>Triumph</i> , estimated catch.....	19,424
No. 15. <i>Black Diamond</i> , estimated catch.....	16,192
No. 16. <i>Lily</i> , balance of catch.....	14,136
No. 17. <i>Ariel</i> , balance of estimated catch.....	9,248
No. 18. <i>Kate</i> , balance of catch.....	10,960
No. 19. <i>Minnie</i> , balance of catch.....	16,112
	<hr/> 357,353

All these items are subject to the objection that they are prospective profits, uncertain and contingent in their nature, and can not be made the basis of a claim for compensation to the owners of these vessels.

In Sedgwick, on the "Measure of Damages," page 69, sixth American edition, it is said:

The early cases in both the English and American courts, generally concurred in denying profits as any part of the damage to be compensated, whether in cases of contract or tort.

In a case for illegal capture, where one of the items of the claim for damages was the profits on the voyage broken up by the capture, the court said:

Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies and would require a knowledge of foreign markets to an exactness in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival; much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjecture and not upon facts.¹

In the case of the *Amiable Nancy*, Mr. Justice Story, speaking for the United States Supreme Court, said:

Another item is \$3,500, for the loss of the supposed profits of the voyage on which the *Amiable Nancy* was originally bound. In the opinion of the court, this item also was properly rejected. The probable or possible benefits of a voyage, as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court can not believe it proper to entertain it. In several cases in this court, the claim for

¹ The schooner *Lively*, 1 Gallison, 314.

profits has been expressly overruled; and in *Del Col v. Arnold* (3 Dall., 333) and *The Anna Maria* (2 Wheat., 327), it was, after strict consideration, held that the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete indemnity for all possible injuries; but it has certainty and general applicability, to recommend it, and, in almost all cases, will give a fair and just recompense.¹

And in Wood's *Mayne on Damages*,² the author, speaking of damages in cases of tort, says:

In general, however, injuries to property, where unaccompanied by malice, and especially where they take place under a fancied right, are only visited with damages proportionate to the actual pecuniary loss sustained.

While it is conceded that there has been some relaxation of the rigid rule of the early cases in England and the United States, in regard to the allowance of profits as an element for the award of damages or compensation, it is undoubtedly still the rule in both countries that profits can only be allowed as damages where they are in the contemplation of parties, in cases arising on contract, and where they are the necessary and proximate result of the injury in cases of tort, and in those latter cases only where they can be proven or established with substantial certainty.³

These vessels were all engaged in a hazardous voyage upon the boisterous waters of the North Pacific Ocean and Bering Sea, subject to all the perils of the sea, and the mind can hardly conceive any event more uncertain and contingent than the number of seals they would have captured if they pursued their voyages unmolested. Shipwreck and every other element of uncertainty, including the proverbial uncertainty which is always an element in fishing and hunting expeditions, would seem to attend all such ventures, and the cogent reasoning of Mr. Justice Story in the cases just cited seems unqualifiedly applicable to the items of "probable catch," etc., presented in this schedule of claims.

The Tribunal will bear in mind that the United States do not occupy the position of a tort-feasor, subject to exemplary or vindictive damages. "The King (Sovereign) can do no wrong." The acts, in respect to which compensation is asked in behalf of these British

¹3 Wheaton's U. S. Repts., 546; see also *Smith vs. Coudry*, 1 How. U. S. Repts., 28-34.

²First American edition, from third English edition, p. 56.

³*Hadley vs. Baxendale*, 9 Exch. 341; *Masterton vs. Mayor of Brooklyn*, 7 Hll, 62.

subjects, were performed by the United States in the exercise of its sovereignty, and the execution of its statutory laws, and no malice or other unjust motive can be imputed to those acts.

Among the claims presented by the United States in behalf of its citizens to the Tribunal of Arbitration upon the Alabama claims, which met at Geneva in 1872, under the treaty between Great Britain and the United States, were a large number of claims like those now under consideration, for the prospective earnings of ships destroyed by the rebel cruisers in the late civil war of the United States, and that tribunal, by the unanimous vote of its members, said in regard to such claims:

And whereas prospective earnings can not properly be made the subject of compensation inasmuch as they depend in their nature upon future and uncertain contingencies, the tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.¹

It is therefore respectfully submitted that the rule of decision adopted in the case of the Alabama claims is well established in the jurisprudence of the two nations now at the bar of this High Tribunal; and in the light of the authorities cited the undersigned respectfully insists that the items in these claims for "probable catch," "estimated catch," etc., which amount in the aggregate to over two-thirds of the grand total of the claims presented, must be considered as wholly speculative and so uncertain that Great Britain is not entitled to any finding as to any fact involved therein, except the fact of their uncertainty, which appears on the face of the claims themselves.

In the claims growing out of the seizures of the *Carolina*, *Thornton*, *Onward*, *Sayward*, *Grace*, *Anna Beck*, *Dolphin*, and *Ada* there are also items for the future earnings of those vessels,² namely:

No. 1, <i>Carolina</i> , seized 1886:	
Claims for earnings in 1887.....	\$5,000
Claims for earnings in 1888.....	5,000
No. 2, <i>Thornton</i> , seized in 1886:	
Claims for estimated loss to owner by detention in 1887	5,000
Claims for estimated loss to owner by detention in 1888.....	5,000
No. 3, <i>Onward</i> , seized in 1886:	
Claims reasonable profit for season of 1887.....	5,000
Claims reasonable profit for season of 1888.....	5,000

¹ Geneva Arbitration, Congressional publication, vol. iv, p. 53; see also Wheaton's *International Law* (Boyd's 3d English edition), sec. 539, t, p. 592.

² Case of Her Majesty's Government, Schedule of Claims, pp. 5, 9, 14, 19, 23, 27, 31, 38.

No. 5, <i>Sayward</i> , seized in 1887:	
Claims for earnings in coasting trade in fall of 1887.....	\$1,200
Earnings for season of 1888	6,000
No. 6, <i>Grace</i> , seized in 1887:	
Claims for probable earnings in fall of 1887.....	2,000
Claims for probable earnings in season of 1888.....	7,000
No. 7, <i>Anna Beck</i> , seized in 1887:	
Claims for probable earnings in coasting trade in fall of 1887	2,000
For probable net earnings in season of 1888.....	6,000
No. 8, <i>Dolphin</i> , seized in 1887:	
Claims for probable earnings in fall of 1887.....	2,000
Claims for probable net earnings in season of 1888	7,000
No. 10, <i>Ada</i> , seized in 1887:	
Probable earnings in fall of 1887.....	2,000
Probable earnings for season of 1888	6,000
Total.....	71,200

These items it will be noticed are in addition to the items of "probable catch," or "estimated catch" for the seasons in which the respective vessels were seized.

Nothing can more fully illustrate the wholly speculative character of this class of claims than a consideration of these items in the light of the indisputable facts.

The *Carolina*, *Thornton*, *Onicard*, *Grace*, *Anna Beck*, *Dolphin*, and *Ada* were seized and decrees of forfeiture rendered against them by the United States district court for the district of Alaska, and the *Carolina*, *Onicard*, and *Thornton* were left to go to pieces in the harbor of Onalaska;¹ and the *Dolphin*, *Grace*, *Anna Beck*, and *Ada* were sold under decrees of that court, while the *Sayward* was released on a bond given by her owners a year or more after the decree of forfeiture was entered.

These seizures were in effect a conversion of these vessels at the time of the seizure, and, with the exception of the *Sayward*, their capacity to earn anything for their owners ended with the seizure. The measure of compensation to the owners was therefore the value of the property taken at the time it was taken, perhaps with interest from the time of taking. The owners were dispossessed by the seizure, and their interest in the property merged in their claim for compensation, if they have any such claim; and no claim can therefore accrue to them for the possible future earnings of the vessels.²

¹ Declarations of James Douglas Warner, Case of Her Majesty's Government, Schedule of Claims, pp. 3, 6, 12.

² Sedgwick on Measure of Damages, 6th ed. 583; Conrad v. Pacific Insurance Company, 6 Peters U. S., 262-282; The Ann Caroline, 2 Wall., 22 U. S. 538; Smith et. al. v. Coudry, 1 How. U. S., 28-34; Wood's Mayne on Damages, 3 Eng. and 1st Am. ed., p. 486.

In Sutherland on Damages, vol. 1, p. 173 (now a standard authority in the courts of the United States), the rule is stated as follows:

The value of the property constitutes the measure or an element of damages in a great variety of cases both of tort and contract; and where there are no such aggravations as call for or justify exemplary damages, in actions in which such damages are recoverable, the value is ascertained and adopted as the measure of compensation for being deprived of the property, the same in actions of tort as in actions upon contract. In both cases the value is the legal and fixed measure of damages and not discretionary with the jury. * * * And, moreover, the value is fixed in each instance on similar considerations at the time when by the defendant's fault the loss culminates. (*Grand Tower Co. vs. Phillips*, 23 Wall., 471. *Owen vs. Routh*, 14 U. S., 327.)

To recapitulate: None of the items of these several claims for "estimated catch," or "probable catch," for the season or voyage in which the seizures took place can be considered, because they are in the nature of prospective profits, and fall within the rule adopted by the tribunal in the Alabama Claims, and the other authorities cited; and all the items for the probable earnings of these arrested vessels, subsequent to the seizure, fall within the same objection of uncertainty and contingency, and the further objection that the conversion of the property was completed by the seizure, and the owners' only remedy was for the value of the property so seized at the time of the seizure.

But, if the Tribunal for any reasons shall deem itself required to pass upon these items or find any facts involved therein, except that of their invalidity, we then briefly submit that the "estimated" and "probable catches" are altogether overstated and extravagant.

In the declaration of James Douglas Warren, in support of the claims in behalf of the alleged owner of the *Sayward*, *Anna Beck*, *Grace*, and *Dolphin*, he states that the estimate is made on the basis of three hundred and fifty skins taken by each boat and canoe for the full season.¹

In the report of the British Commissioners, forming part of the British case,² it is shown that the average catch per canoe or boat for the British sealers for the same year was 164 seals, or less than one-half of Capt. Warren's average; and in the same paragraph, the British Commissioners say:

The actual success of individual sealing vessels of course depends so largely upon the good fortune or good judgment which may enable them to fall in with and follow considerable bodies of seals, as well as

¹ Case of Her Majesty's Government, Schedule of Claims, pp. 18, 22, 25, 29.

² Report of Br. Com., sec. 407, p. 74.

on the weather experienced, that the figures representing the catch compared to the boats or whole number of men employed constitute a more trustworthy criterion than any general statements.¹

We may, therefore, safely say that if conjecture, based upon any rule of averages, is to be resorted to for the purpose of attempting to approximate the probable catches of these vessels, the British Commissioners have given far more reliable data than that furnished by these claimants.

The fallacy of these "estimates" is also shown in another way. We open the schedule of the British claims at random and take the claim growing out of the seizure of the *Minnie*, No. 19.² It seems, from the declaration accompanying the claim, that she left Victoria the fore part of May on a sealing voyage in the North Pacific Ocean and Bering Sea. She entered Bering Sea on the 27th of June, at which time she had caught 150 seals. She hunted seals in the Bering Sea until July 15, during which time she had taken 270 skins, which was at the rate of 15 skins per day. She was seized on the 15th of July; leaving her 16 days of July and 16 in August, making 32 days in all of her sealing season, during which time she would have caught, at the rate of 15 per day, 480 seals; to which adding the 420 she had taken previously, makes a total catch for the sealing season of 900; while her "estimated catch" is 2,500 seals for the season.

Take also the claim of the *Ada*, No. 10.³ She entered Bering Sea, as is shown by the declaration accompanying the claim, about the 16th day of July, 1887, and continued sealing in the said sea until the 25th day of August, which was beyond the time when skins taken are considered merchantable,⁴ and within two weeks of the time when, as the British Commissioners admit,⁵ the sealing season closes, and yet her entire catch up to that time was only 1876 skins, while the "estimated" or "probable catch" is put at 2876.

The value and tonnage of these vessels is also largely overstated, as is shown by the tables submitted with the Counter Case of the United States,⁶ and the value of several of the vessels seized was ascertained by sworn appraisers of the District Court of Alaska and shown to be much lower than the value stated in this schedule of claims.⁷ That these

¹ Report of Br. Com., p. 73, sec. 407.

² Case of Her Majesty's Government, Schedule of Claims, p. 56.

³ *Ibid.*, p. 34.

⁴ Counter Case of the United States, Appendix, pp. 357, 376, 384.

⁵ Report of Br. Com., sec. 212.

⁶ Counter Case of the United States, Appendix, pp. 339, *et seq.*

⁷ *Ibid.*, pp. 329-38.

appraisals were fair and showed the substantial and fair value of the property is evidenced by the fact that, although the owners of the vessels had the privilege of releasing them upon bonds, none of them, except the *Sayward*, were so released, although application was made to have their valuation reduced in order that the owners might give bonds.¹

We might follow the analysis of different items of these claims and successfully show that they are all very much exaggerated, but do not deem it necessary to do so, because we feel sure the members of this Tribunal will take notice of the fact that individuals in making claims against a government, whether it be their own or a foreign government, invariably expand these claims to the largest amount their consciences will possibly tolerate.

H. W. BLODGETT.

¹ Senate Doc. 106, 50th Cong., Second Sess., pp. 23, 74.

SIXTH.

SUMMARY OF THE EVIDENCE.

To the end that the High Contracting Parties should become fully informed of all the facts bearing upon the differences between them, and as a right method of securing evidence as to those points touching which a dispute might exist, it was stipulated by Article IX of the Treaty that two Commissioners on the part of each Government should be appointed to make a joint investigation and to report, in order that such reports and recommendations might in due form be submitted to the Arbitrators, should the contingency therefor arise.

The Commissioners were duly appointed in compliance with this provision of the Treaty, and so far as they were able to agree, they made a joint report, which is to be found at page 307 of the Case of the United States. It will be seen from this joint report that the Commissioners were in thorough agreement that, for industrial as well as for other obvious reasons, it was incumbent *upon all nations, and particularly upon those having direct commercial interests in fur-seals, to provide for their proper protection and preservation.* They were also in accord as to the fact that since the Alaska purchase a marked diminution of the number of seals *on and habitually resorting to the Pribilof Islands* had taken place; that this diminution was cumulative in effect and was the result of excessive killing by man. Beyond this the Commissioners were unable, by reason of considerable difference of opinion on certain fundamental propositions, to join in a report, and they therefore agreed that their respective conclusions should be stated in several reports which, under the terms of the Treaty, might be submitted to their respective Governments.

The United States have submitted, with the report of their Commissioners, a voluminous mass of testimony which appears to have been elicited from all classes of persons who, by their education, residence, training, etc., might be enabled to give information of practical value and of a reliable character to the contracting governments. It has

been the intention, in procuring evidence, to follow, as closely as the circumstances permitted, the principles and methods obtaining in both countries in litigation between private parties, and although it was not possible to produce each witness before a magistrate and tender him for cross-examination, in every instance the name, the residence, and the profession or business of the witness has been given, and in every instance the witness has sworn to the truth of his deposition. This method of performing their functions may be favorably contrasted with the course which the Commissioners of Great Britain thought it incumbent upon or permissible for them to pursue. In very few instances have they seen fit to give the name of their informant or to place it in the power of the United States to test the reliability of the source from which they had derived their knowledge, real or supposed. But they have presented a great mass of statements of their own, evidently based in a great measure upon conjecture, much of it directly traceable to manifest partiality, and marked, to a singular degree, by the exhibition of prejudice against the one party and bias in favor of the other. The extent to which this has been carried must, in the eyes of all impartial persons, deprive it of all value as evidence.

How far counsel for the United States are justified in making this sweeping criticism upon the work of the British Commissioners will appear hereafter, when detailed attention is given to the result of their labors. The adoption of such a course is the more to be regretted as it was evidently the purpose and object of the British Government that an entirely different investigation should be carried out by its agents; nor had that Government hesitated to express its earnest desire that the *actual facts* should be given and that the investigation should be carried on with a strict impartiality. It is certain that the Commissioners were warned in clear language that "great care should be taken to sift the evidence that was brought before them." (See instructions to the British Commissioners, page 1 of their Report).

In attempting to lay before this distinguished Tribunal the facts that may enlighten its judgment, the counsel for the United States propose to show what facts are established, substantially without controversy, and wherein their contention in case of difference is sustained by unmistakable preponderance of proof. For the purpose of facilitating the labors of this body, they propose to treat every topic of special importance separately and to produce the evidence which has a bearing upon the discussion of its merits.

I.—THE GENERAL NATURE AND CHARACTERISTICS OF THE FUR-SEAL.

It is unfortunate that even upon so familiar a subject and one so often treated as the seal, its nature, and habits, there should be a wide divergence between the American and British Commissioners. In fact, it would seem that the animal observed by the Commissioners from Great Britain was an entirely different animal from that considered and studied by the Commissioners appointed by the United States. This is the more remarkable because for more than a century a multitude of observers, scientists, government agents, and overseers have been giving their attention to the nature, habits, and life of the fur-bearing seal, the best method of protecting the animal from destruction, and the wisest course to secure an annual increase for the purposes of commerce; the reason for which the supply of these valuable creatures has diminished; the number of animals yearly killed, etc. They certainly by this time ought to have become fairly ascertained and known and to be placed beyond the reach of discussion or dispute, and so, in fact, they seem to be. There has been a general concurrence among the observers referred to, as complete as may be found among the same class of persons in relation to the nature and habits of ordinary domestic animals.

But it has become apparent that the British Commissioners have in their separate report thought fit to make an elaborate defense of the practice of pelagic sealing and to have imparted to their investigations and the formulation of their conclusions so strong a desire to protect the supposed interests of their people as to lead them to most extraordinary conclusions; indeed, this unfortunate result seemed almost inevitable, the premises upon which they started being conceded. To defend pelagic sealing, the main feature of which consists of slaughtering gravid females or nursing mothers, it was almost inevitable that some fundamental mistakes should be made as to the nature and habits of the animals and that statements should be adopted and theories advanced which, upon their face, are utterly unworthy of countenance or respect. The animal discovered by the British Commissioners might be defined to be a mammal essentially pelagic in its natural condition and which might be entirely so if it chose to be; an animal, too, which is gradually assuming that exclusive character. Coition takes place very frequently and more naturally in the water. It is a polygamous animal and when on land exhibits extreme jealousy to guard its har-

but whether this disposition is preserved and exhibited in the water, and how or whether this is a disappearing trait, does not appear. Two pups are not infrequently dropped at a birth, and the mothers, with a generous disregard for the ordinary rules of maternity in nature, suckle their own when it is convenient, but take up other pups indifferently, provided the strange offspring does not betray the odor of fresh milk. By this indiscriminate display of maternal instinct the generality of pups are supported until they are able to procure their own food. The loss of an individual mother becomes in consequence of this a matter of small moment, and, to make the peculiarity of the animal especially remarkable, it is said to abstain, during several weeks of the nursing period, from seeking food for itself and for the young offspring that would generally be supposed to drain its vitality. Such is the seal and such are the habits, especially of the females, as seen and described by the British Commissioners.

The expression of an opinion so directly in conflict with those generally received would seem to require the most cogent proofs. Reliable authorities should be cited and their names given. Hazardous conjectures should be wisely laid aside; ignorant, hasty, and prejudiced gossip should be treated as it deserves, and some effort made to reconcile individual observation with generally accepted and accredited facts.

The counsel for the United States have no hesitation in saying that if the question to be decided were one in which the common-law rules of evidence prevalent in both parties to the Treaty were applied, they would respectfully insist, with much confidence, that there is *no dispute* really as to the main facts in this case. A controversy as to facts in the juridical sense implies an assertion on the one side and a contradiction on the other; but contradictions can not be predicated on statements unauthenticated by proof and unsupported by general experience. It would suffice to show that the Report of the Commissioners from Great Britain simply presents the assertions and conjectures of gentlemen who, however respectable their character may be, were not called upon to express, and are not justified in laying down conclusions, except in so far as they have reached them by an examination into actual facts, the sources of which both Governments would be entitled to consider. Justice to the disputants, as well as a proper respect for the Tribunal, would seem to dictate this necessity of avoiding the rash expression of conjectures generally unsupported, but occasionally founded on other

like conjectures emanating from ignorance and hasty observers whose names are not infrequently withheld.

It may, however, facilitate the learned Arbitrators in inquiries into the facts referred to, to indicate the nature of the evidence bearing upon the different points respectively and the places where it may be found. It is believed that nothing more is requisite. Of matters not in any manner drawn in question, little or no notice will be taken.

II.—THE DIFFERENCE BETWEEN THE ALASKAN AND THE RUSSIAN FUR-SEALS.

The marked differences between the Alaskan and the Russian seals are such as to be plainly and readily discernible to persons familiar with the two herds and their characteristics. This once established would naturally prove that there is no commingling of the respective herds. But we are not left to inference upon this point, and may confidently claim that the proposition is affirmatively established by testimony respectable and creditable in itself, while it is wholly uncontradicted by proof.

This is the statement in the Case of the United States:

The two great herds of fur-seals which frequent the Bering Sea and North Pacific Ocean and make their homes on the Pribilof Islands and Commander (Komandorski) Islands, respectively, are entirely distinct from each other. The difference between the two herds is so marked that an expert in handling and sorting seal skins can invariably distinguish an Alaskan skin from a Commander skin. In support of this we have abundant and most respectable testimony. Mr. Walter E. Martin, head of the London firm of C. W. Martin & Co., which has been for many years engaged in dressing and dyeing seal skins, describes the difference as follows: "The Copper Island (one of the Commander Islands) skins show that the animal is narrower in the neck and at the tail than the Alaska seal and the fur is shorter, particularly under the flippers, and the hair has a yellower tinge than the hairs of the Alaska seals."

In this statement he is borne out by Snigeroff, a native chief on the Commander Islands and once resident on the Pribilof Islands.

C. W. Price, for twenty years a dresser and examiner of raw seal-skins, describes the difference in the fur as being a little darker in the Commander skin. The latter skin is not so porous as the Alaskan skin, and is more difficult to unhair. The difference between the two classes of skins has been further recognized by those engaged in the seal-skin industry in their different market value, the Alaska skins always being held from 20 to 30 per cent more than the "Coppers" or Commander skins. This difference in value has also been recognized by the Russian Government.

(A) THE HERDS ARE DIFFERENT.

Mr. George Bantle (p. 508, Appendix to Case of the United States, Vol. II), one of the witnesses upon this point, is a packer and sorter of raw fur-kins. He had been in that business, at the time of testifying, twenty years, and had handled many thousands of skins. He says:

I can tell by examining a skin whether it was caught in season or out of season, and whether it was caught on the Russian side or on the American side. A Russian skin is generally coarser, and the under wool is generally darker and coarser, than the skins of seals caught on the American side. A Russian skin does not make as fine a skin as the skins of the seals caught on the American side, and are not worth as much in the market. I can easily distinguish one from the other.

Mr. H. S. Bevington, M. A. (*ibid.*, p. 551), a subject of Her Britannic Majesty, forty years of age, the head of the firm of Bevington & Morris, 28 Common street, in the city of London, was sworn and testified upon the subject. His testimony is interesting, and may be found at page 550, Volume II, of the Appendix to United States Case. Upon the subject of the variations observable, he says:

That the differences between the three several sorts of skins last mentioned are so marked as to enable any person skilled in the business or accustomed to handle the same to readily distinguish the skins of one catch from those of another, especially in bulk, and it is the fact that when they reach the market the skins of each class come separately and are not found mingled with those belonging to the other classes. The skins of the Copper Island catch are distinguished from the skins of the Alaska and Northwest catch, which two last-mentioned classes of skins appear to be nearly allied to each other and are of the same general character, by reason of the fact that in their raw state the Copper skins are lighter in color than either of the other two, and in the dyed state there is a marked difference in the appearance of the fur of the Copper and the other two classes of skins. This difference is difficult to describe to a person unaccustomed to handle skins, but it is nevertheless clear and distinct to an expert, and may be generally described by saying that the Copper skins are of a close, short and shiny fur, particularly down by the flank, to a greater extent than the Alaska and Northwest skins.

Joseph Stanley-Brown (*ibid.*, p. 12) a geologist of distinction, residing at Mentor, Ohio, was commissioned by the Secretary of the Treasury to visit the Pribilof Islands for the purpose of studying the seal life found thereon; he spent one hundred and thirty days in actual investigation and study of the subject. While he does not claim to have become an expert in that time as to the various and distinguishing

characteristics of the animals, he stated the result of his efforts to ascertain the truth in this respect:

I learned that fur-seals of the species *Callorhinus ursinus* do breed and haul out at the Commander Islands and "Robben Reef," but the statements made to me were unanimous that they are a separate herd, the pelt of which is readily distinguished from that of the Pribilof herd, and that the two herds do not intermingle.

Isaac Liebes, a fur merchant of twenty-three years standing, residing at San Francisco, claims to have handled more raw fur-seal skins than any other individual in the United States or Canada and more than any firm or corporation except the lessees of the sealeries of the Pribilof and Commander Islands. His whole deposition, based as it is upon long practice and experience, may be read with profit. On the subject of the differences between the skins of animals belonging to the respective herds, he says: (*ibid.*, p. 445.)

The seals to which I have reference are known to myself and to the trade as the Northwest Coast seals, sometimes called, "Victorias." This herd belongs solely to the Pribilof Islands, and is easily distinguishable by the fur from the fur-seals of the other northern rookeries, and still easier from those of the south. All expert sealskin assorters are able to tell one from the other of either of these different herds. Each has its own characteristics and values.

To the same effect is the deposition of Sidney Liebes, a fur dealer of San Francisco. He had been engaged in the fur business for the last six years, at the time of testifying. He testified in substance, as did the other witnesses, as follows (*ibid.*, p. 516):

My age is 22. I reside in San Francisco, and am by occupation a furrier, having been engaged in that business for the last six years. I have made it my business to examine raw seal-skins brought to this city for sale, and am familiar with the different kinds of seal-skins in the market. I can tell from an examination of a skin whether it has been caught on the Russian or American side. I have found that the Russian skins were flat and smaller, and somewhat different in color in the under wool, than those caught on the American side. In my opinion they are of an inferior quality. The Alaska skins are larger and the hair is much finer. The color of the under wool is also different. I have no difficulty in distinguishing one skin from the other. I am of opinion that they belong to an entirely separate and distinct herd. In my examination of skins offered for sale by sealing schooner I found that over 90 per cent were skins taken from females. The sides of the female skins are swollen, and are wider on the belly than those of males. The teats are very discernible on the females, and can be plainly seen where the young have been suckling. The head of the female is also much narrower.

Mr. Thomas F. Morgan was the agent, in 1891, of the Russian Sealskin Company of Petersburg. Prior to that time he had been engaged in seal fishing; he resided several years, as agent of the Alaska Commercial Company, on the Pribilof Islands. His long and varied experience fitted him in an especial manner to testify intelligently on the subject. He says (*ibid.*, p. 61):

The Alaska fur-seal breeds, I am thoroughly convinced, only upon the Pribilof Islands; that I have been on the Alaska coast and also along the Aleutian Islands; that at no points have I ever observed seals haul out on land except at the Pribilof Islands, nor have I been able to obtain any authentic information which causes me to believe such is the case.

The Alaska fur-seal is migratory, leaving the Pribilof Islands in the early winter, going southward into the Pacific and returning again in May, June, and July to said islands. I have observed certain bull seals return year after year to the same place on the rookeries, and I have been informed by natives that have lived on the islands that this is a well-known fact and has been observed by them so often that they stated it as an absolute fact.

It is also interesting to note, from his supplemental sworn statement, that the British Commissioners had *some* testimony to show that there was no identity between the herds (*ibid.*, p. 201):

I was on the Bering Island at the same time that Sir George Baden-Powell and Dr. George M. Dawson, the British representatives of the Bering Sea Joint Commission, were upon said island investigating the Russian sealeries upon the Komandorski Islands; that I was present at an examination, which said Commissioners held, of Sniegeroff, the chief of the natives on the Bering Island, who, prior to the cession of the Pribilof Islands by Russia to the United States, had resided on St. Paul, one of the said Pribilof Islands, and that since that time had been a resident on said Bering Island, and during the latter part of said residence had occupied the position of native chief, and as such, superintended the taking and killing of fur-seals on said Bering Island; that during said examination the Commissioners, through an interpreter, asked said Sniegeroff if there was any difference between the seals found on the Pribilof Islands and the seals found on the Komandorski Islands; that said Sniegeroff at once replied that there was a difference, and on further questioning stated that such difference consisted in the fact that the Komandorski Island seals were a slimmer animal in the neck and flank than the Pribilof Island seals; and further, that both hair and fur of the Komandorski Island seal were longer than the Pribilof Island seal; said Commissioners asked said Sniegeroff the further question whether he believed that the Pribilof herd and Komandorski herd ever mingled, and he replied that he did not.

Mr. John N. Lofstad (*ibid.*, p. 516,) a fur merchant of San Francisco, testifies that he can easily distinguish the Copper Island seal in its

undressed state from that of the Alaskan and Northwest Coast skins. They are of an entirely distinct and separate herd, while those of the Northwest Coast and Pribilof Islands are of the same variety. He says:

I have been in the business for twenty-eight years during which time I have bought large numbers of dressed and undressed fur skins, and I am thoroughly familiar with the business. I can easily distinguish the Copper Island fur-seal skin in its undressed state from that of the Alaskan and Northwest Coast skins. They are of an entirely distinct and separate herd, while those of the Northwest Coast and Pribilof Islands are of the same variety.

To the same effect Mr. Gustave Niebaum (*ibid.*, p. 78), Mr. Niebaum's experience was such as to entitle him to speak as an expert. His opportunities to inform himself thoroughly on all matters connected with sealeries were of the best, and at the same time he had no interest whatever in the sealeries or the seal-skin trade. He is a native of Finland and became an American citizen by the transfer of Alaska to the United States. He was vice-consul of Russia at San Francisco from 1880 to 1891. He says:

I was formerly, as I have stated, interested in the Commander seal islands, as well as those of Alaska. The two herds are separate and distinct, the fur being of different quality and appearance. The two classes of skins have always been held at different values in the London market, the Alaskan bringing invariably a higher price than the Siberian of the same weight and size of skins. I think each herd keeps upon its own feeding grounds along the respective coasts they inhabit.

It may be unnecessary—as it would certainly be monotonous—to multiply citations. Other witnesses, however, testify to the same effect. The American Commissioners have given their names and addresses, as well as their sworn statements. The Arbitrators will, therefore, be enabled to determine whether or not the evidence is, as we claim that it is, absolutely conclusive. In a court of law, such a consensus of opinion and statement made under the sanction of an oath and uncontradicted, save by more or less ingenious but unsustained conjecture, would satisfy the judgment of the most exacting judge. Other depositions equally important may be quoted in addition to the above.

Mr. Walter E. Martin (*ibid.*, p. 569), was, at the time of giving his testimony, a subject of Her Majesty, residing at the city of St. Albans. He had been engaged, on a very large scale, in the business of dress-

ing and dyeing sealskins. He says that if one thousand Copper Island skins were mingled among ninety-nine thousand Alaska skins, it would be possible for any one skilled in the business to extract nine hundred and fifty of the Copper Island skins and to separate them from the ninety-nine thousand and fifty of the Alaska catch, and *vice versa*.

Mr. N. B. Miller (*ibid.*, p. 199). Mr. Miller was at the time of testifying an assistant in the scientific department of the United States Fish Commission steamer *Albatross*. He had made five cruises in Alaskan waters; he says:

The seals of the Commander Islands are grayer in color and of a slighter build throughout the body. The bulls have not such heavy manes or fur capes, the hair on the shoulders being much shorter and not nearly so thick. The younger seals have longer and more slender necks apparently. I noticed this difference between the seals at once.

Mr. John J. Phelan (*ibid.*, p. 518) was a citizen of the United States and a resident of Albany, N. Y. He was 35 years of age at the time of giving his deposition, and since the age of eleven had been in the fur business. His practical and active experience was very large during those twenty-three years. He had noticed the difference in the seals, both in their raw state and during the processes of dressing. He explained minutely the point of difference.

Mr. Henry Poland (*ibid.*, p. 570) was a subject of Her Majesty and the head of the firm of P. R. Poland & Son, doing business at 110 Queen Victoria street, in the city of London. The firm of which he was a member had been engaged in the business of furs and skins for upwards of one hundred years, having been founded by his great-grandfather in the year 1785. His judgment, evidently, is entitled to great respect. He corroborates the other witnesses, and says that the three classes of skins are easily distinguishable from each other by any person skilled in the business. He had personally handled the samples of the skins dealt in by his firm, and would have no difficulty in distinguishing them. In fact, the skins of each of the three classes have different values and command different prices in the market.

Mr. Charles W. Price (*ibid.*, p. 521) is a very expert examiner of raw fur-skins, of San Francisco. He had been engaged in the business twenty years when he was examined by the Commissioners of the United States; he had had a large practical experience. He gives the points of difference between the Russian and American skins, and states, as did Mr. Poland and other witnesses, that the seals on the Russian

side are a distinct and different herd from those on the American side, and are not as valuable.

Mr. George Rice (*ibid.*, p. 572) is another witness whose testimony should command respect. He was fifty years of age and a subject of Her Majesty. He had been engaged actively in the business handling fur-seal skins for twenty-seven years and had acquired a general and detailed knowledge of the different kinds of fur-seal skins and of the differences which distinguish them, as well as the history, character, and manner of conducting the fur-seal sealskin business in the city of London. He says that the differences between the several classes of skins are *very marked*, which enable anybody who is skilled in the business to distinguish the skins of one class from the skins which belong to either of the other classes. He also stated, as did the other experts, that these differences are evidenced by the fact that the skins obtain different prices in the market. The testimony of this gentleman deserves special attention; it is intelligently given and is very instructive.

Mr. Leon Sloss (*ibid.*, p. 90) is a native of California and a resident of San Francisco. He was for several years a director of the Alaska Commercial Company, and a member of the partnership of Louis Sloss & Co., and had been engaged for fifteen years in dealing in wools, hides, and fur-skins. At the time of testifying, he had no interest in seals or sealerics. He had been superintendent of the Alaska sealerics *pro tempore* from 1882 to 1885, inclusive, and spent the sealing season of those three years on the Pribilof Islands in the personal management of the business. He became acquainted, as he testifies, with every aspect of the business. All advices from the London agents and information in regard to the sealskin market, from all sources, passed through his hands, and instructions to agents of the company in regard to the classes of skins desired emanated from time to time from him. He was emphatic in his statement that the difference between the Northern and Southern skins that came to the port of San Francisco could be detected at once. While it was not as easy to distinguish the Alaskan from the Asiatic skins, experts in handling them do it with *unerring accuracy*.

Mr. William C. B. Stamp (*ibid.*, p. 574) was 51 years of age at the time of testifying, and a subject of Her Majesty. He was engaged in the business at 38 Knightrider street, London, E. C., as a fur-skin merchant. He had been engaged in that business for over thirty

years and had personally handled many thousand of fur-seal skins, besides inspecting samples at practically every sale of fur skins made in London during the whole of the time he had been in business. He had thus acquired a general and detailed knowledge of the history of the business and of the character and differences which distinguish the several kinds of skins on the market. He stated it as his judgment that the skins of the several catches are readily distinguishable from each other, and the skins of the different sexes may be as readily distinguished as the skins of the different sexes of any other animal. He added that the difference between the skins of the three catches are so marked that they have always been expressed in the different prices obtained for the skins. He instances the sales on the list, which were as follows: For the Alaska skins, 125 shillings per skin; for the Copper skins, 68 shillings per skin; and for the Northwest, 53 shillings per skin.

Emil Teichmann (*ibid.*, p. 576), was by birth a subject of the Kingdom of Wurtemberg, and had become a naturalized citizen of Her Majesty from the time of reaching his manhood. He was 46 years of age at the time of testifying. He had been engaged in the fur business since 1868, and had resided in England and done business in London. From 1873 to 1880, he had been a member of the firm of Martin & Teichmann, who were then, as its successors C. W. Martin & Son still are, the largest dressers and dryers of sealskins in the world. He had *personally handled many hundreds of thousands of fur-seal skins* and claimed to be, as well he might, an expert on the subject of the various kinds of such skins. His testimony is minute and gives details as to the peculiarities which distinguish the skins. He states that all those differences are so marked as to enable any expert readily to distinguish Copper from Alaska skins, or *vice versa*, although he adds that in the case of very young animals the differences are much less marked than in the case of adults.

George H. Treadwell (*ibid.*, p. 523), at the time of testifying, was 55 years of age. He was a citizen of the United States and a resident of Albany County, in the State of New York. His father, George C. Treadwell, in 1832, started a wholesale fur business of a general character, and his son, the witness, became associated with him in 1858, and upon his death, which occurred in 1885, he succeeded to the business. That business is now conducted under the name of The George C. Treadwell Company, a corporation formed under the

laws of the State of New Jersey, of which corporation the deponent is president. He entirely agrees with what Mr. Phelan says concerning his experience in the handling and dressing of skins, and from what he knows of his character and ability he believes that everything stated by him in his affidavit is correct.

Henry Treadwell (*ibid.*, p. 524), at the time of testifying, was 70 years of age and resided in the city of Brooklyn, in the State of New York. He was a member of the firm of Treadwell & Company, which had been dealing in furs since 1832; they bought, dressed and dyed annually from 5,000 to 8,000 skins. Mr. Treadwell was very emphatic in his statement that the skins of the three catches are readily distinguishable. He stated that he would be able, himself, on an examination of the skins as they are taken from the barrels, to detect at once in a barrel of Alaska skins the skins of either the Copper or the northwestern catch.

William H. Williams (*ibid.*, p. 93) is a citizen of the United States, residing at Wellington, Ohio, and was at the time of testifying the United States Treasury Agent in the charge of the seal islands in Bering Sea. As such and in pursuance of Department instructions, he made a careful examination of the habits and conditions of the seals and seal rookeries, with a view of reporting to the Department his observations. He says, agreeing in this with the numerous other witnesses whose testimony is above given, that the skins of the three catches are readily distinguishable from each other. He also states that the differences are clearly evinced in the prices which have always been obtained for the sealskins of the three catches. For instance, the skins of the Alaska catch were then commanding 20 or 30 per cent better prices than the skins of the Copper catch. This difference is also recognized by the Russian Government, who leased the privilege of catching upon the Commander Islands upon terms 25 per cent less than the terms of the United States for the leased catch upon the Pribilof Islands.

Mr. Maurice Windmiller (*ibid.*, p. 550) was a furrier doing business in San Francisco, in which business he had been engaged all his life, his father having been a furrier before him. He was 46 years of age and claimed to be an expert in dressed and undressed, raw and made-up furs, and a manufacturer and dealer in the same. He was also of opinion that the Russian seal belonged to an entirely different herd from those of the American side, and testified that their skins had such peculiar characteristics that it was not difficult to separate them.

(B) THE ALASKAN DOES NOT MINGLE WITH THE RUSSIAN HERD.

The statement in the Case (p. 99) is in the following words:

The Commander Islands herd is evidently distinct and separate from the Pribilof Islands herd. Its home is the Commander group of islands on the western side of Bering Sea, and its line of migration is westward and southward along the Asiatic coast. To suppose that the two herds mingle and that the same animal may at one time be a member of one herd and at another time of the other is contrary to what is known of the habit of migrating animals in general.

This statement is based on the report of the American Commissioners (page 323 of the Case of the United States), which report states the conclusion reached by them in the following language:

The fur-seals of the Pribilof Islands do not mix with those of the Commander and Kurile Islands at any time of the year. In summer, the two herds remain entirely distinct, separated by a water interval of several hundred miles, and in their winter migrations those from the Pribilof Islands follow the American coast in a southeasterly direction, while those from the Commander and Kurile Islands follow the Siberian and Japan coasts in a southwesterly direction, the two herds being separated in winter by a water interval of several thousand miles. This regularity in the different herds is in obedience to the well-known law *that migratory animals follow definite routes in migration and return year after year to the same places to breed*. Were it not for this law, there would be no such thing as stability of species, for interbreeding and existence under diverse physiographic conditions would destroy all specific characters.

The testimony in support of this proposition seems to be conclusive and certainly must stand until the learned counsel for the Government of Her Majesty succeed in producing the evidence of witnesses who are able and willing to express a different view.

It can not be expected that the witnesses shall speak in the same positive and unqualified manner upon this matter, which, to some extent, must be predicated upon conclusions drawn from facts, as they would and do upon the actual and observable differences between the two families of seals. But it will be found that the testimony is the best obtainable under the circumstances and can leave no reasonable doubt in the minds of impartial persons that the two herds are distinct, that they follow definite routes in migration, and that they return year after year to the same place to breed and never intermingle.

Mr. John G. Blair (Appendix to Case of the United States, Vol. II, p. 193) was at the time of deposing an American citizen, 57 years of age, and had been for fourteen years previous and until recently master

of the schooner *Leon*, then employed by the Russian Sealskin Company. He had been constantly engaged in the fur-sealing industry and was familiar with the habits of these animals, both on the land and in the water. He was in charge of and attended to the killing of seals on Robben Island for the lessees from 1878 to 1885, taking from 1,000 to 4,000 seals per annum. With the exception of two years, when he was sealing on the Commander Islands, he had visited Robben Island every year from 1878 to 1885. His testimony upon this point is as follows:

I am told and believe that the Robben Island seals can be distinguished by experts from those on the Commander Islands, and am satisfied that they do not mingle with them and are a separate and distinct herd. They remain on and about the islands in large numbers until late in the fall. I have been accustomed to leave in October or early November, and seals were always plentiful at that time. I am of opinion that they do not migrate to any great distance from the island during the winter. A few hundred young pups are caught every winter by the Japanese in nets off the north end of Yesso Island. I have made thirty-two voyages between the Aleutian Archipelago and the Commander Islands, but have never seen seals between about longitude 170 west and 165 east. I am satisfied that Alaska seals do not mix with those of Siberia. I have seen seals in winter and known of their being caught upon the Asiatic side as far south as 36 north latitude.

William H. Brennan (*ibid.*, p. 358): Mr. Brennan, at the time of testifying, resided at Seattle, in the State of Washington. He was an English subject by birth and had spent the best part of his life in the close study of the inhabitants of the sea, including seals and the modes of capturing them. He had passed his examination as second mate in London in 1874, and had been to Australia, China, and Japan. In the last country he had remained several years. Since that time he has followed the sea as sailing captain, pilot, and quartermaster on vessels sailing out of Victoria, British Columbia. He testified as follows:

In my opinion, fur-seals born on the Copper, Bering, or Robben islands will naturally return to the rookery at which they were born. The same thing is true of those born on the St. Paul or St. George islands. No vessel, to my knowledge, has ever met a band of seals in midocean in the North Pacific. I have crossed said water on three different occasions, and each time kept a close lookout for them. The greater part of the seals that we find in the North Pacific Ocean are born on the islands in Bering Sea. Most of them leave there in October and November.

C. H. Anderson (*ibid.*, p. 205): Mr. Anderson was a master mariner by occupation, residing in San Francisco, and had been sailing in Alaskan waters since 1880. He says:

I think the Commander Islands seals are a different body of seals altogether from those of the Pribilofs, and that the two herds never mingle. I think the Commander Islands herd goes to the southward and westward toward the Japanese coast. I never knew of fur-seals hauling out to rest or breed at any place in the Aleutian chain, or anywhere, in fact, except the well-known rookeries of the several seal islands of Bering Sea.

Charles Bryant (*ibid.*, p. 4): Mr. Bryant, at the time of testifying, was 72 years of age and had resided in Plymouth County, Massachusetts. From 1840 to 1858 he had been engaged in whaling in the North Pacific Ocean or Bering Sea. During the latter portion of the time he commanded a whaling vessel. In 1868 he was appointed as Special Treasury Agent to go to the Pribilof Islands to investigate and to report as to the habits of the fur-seal, the conditions of the islands and the most advantageous plan to adopt for the government and management of the same. He remained on St. Paul Island from March, 1869, to September of that year. He returned July, 1870, and remained until the fall of 1871. Then in April, in 1872, he again arrived on St. Paul Island as Special Agent of the Treasury Department in charge of the seal islands, and he spent there the sealing seasons from 1872 to 1877, inclusive, and three winters, namely, 1872, 1874, and 1876, since which time he has lived in retirement at Mattapoisett, Plymouth county, Massachusetts. His testimony upon this point is as follows:

The Alaska fur-seal breeds nowhere except on the islands. I took particular care in investigating the question of what became of the seal herd while absent from the islands. My inquiries were made among the Alaskan Indians, half-breeds, Aleuts, and fur-traders along the Northwest Coast and Aleutian Islands. One man, who had been a trapper for many years along the coast, stated to me that in all his experience he never knew of but one case where seals had hauled out on the Pacific coast, and that was when four or five landed on Queen Charlotte Island. This is the only case I ever heard of seals coming ashore at any other place on the American side of the Pacific, except the Pribilof Islands. These seals are migratory, leaving the islands in the early winter and returning again in the spring. The Pribilof herd does not mingle with the herd located on the Commander Island. This I know from the fact that the herd goes eastward after entering the Pacific Ocean, and from questioning natives and half-breeds, who have resided in Kamschatka as employes of the Russian Fur Company, I learned that the Commander herd on leaving their island go southwestward into the Okhotsk Sea and the waters to the southward of it and winter there. This fact was further verified by whalers who find them there in the early spring.

The Alaskan seals make their home on the Pribilof Islands because they need for the period they spend on land a peculiarly cool, moist, and cloudy climate, with very little sunshine or heavy rains. This peculiarity of climate is only to be found on the Pribilof and Commander

islands, and during my long experience in the North Pacific and Bering Sea I never found another locality which possessed these conditions so favorable to seal life. Add to this fact the isolated condition of the seal islands and we can readily see why the seal selected this home.

Mr. Alfred Fraser (*ibid.*, pp. 554, 558) is another witness to whose testimony exceptional importance should be attached. He was of opinion that the herds from which skins are obtained do not in fact intermingle with each other, because the skins classified under the head of Copper catch are not found among the consignment of skins received from the Alaska catch, and *vice versa*. His testimony is quoted at some length, and is as follows:

That he is a subject of Her Britannic Majesty and is 52 years of age and resides in the city of Brooklyn, in the State of New York. That he is a member of the firm of C. M. Lampson & Co., of London, and has been a member of said firm for about thirteen years; prior to that time he was in the employ of said firm and took an active part in the management of the business of said firm in London. That the business of C. M. Lampson & Co. is that of merchants, engaged principally in the business of selling skins on commission. That for about twenty-four years the firm of C. M. Lampson & Co. have sold the great majority of the whole number of sealskins sold in all the markets of the world. That while he was engaged in the management of the business of said firm in London, he had personal knowledge of the character of the various sealskins sold by the said firm, from his personal inspection of the same in their warehouse and from the physical handling of the same by him. That many hundred thousands of the skins sold by C. M. Lampson & Co. have physically passed through his hands; and that since his residence in this country he has, as a member of said firm, had a general and detailed knowledge of the character and extent of the business of said firm, although since his residence in the city of New York he has not physically handled the skins disposed of by his firm.

Deponent is further of the opinion, from his long observation and handling of the skins of the several catches, that the skins of the Alaska and Copper catches are readily distinguishable from each other, and that the herds from which such skins are obtained do not in fact intermingle with each other because the skins classified under the head of Copper catch are not found among the consignments of skins received from the Alaska catch, and *vice versa*.

Deponent further says that the distinction between the skins of the several catches is so marked that in his judgment he would, for instance, have had no difficulty, had there been included among 100,000 skins in the Alaska catch 1,000 skins of the Copper catch, in distinguishing the 1,000 Copper skins and separating them from the 99,000 Alaska skins, or that any other person with equal or less experience in the handling of skins would be equally able to distinguish them. And in the same way deponent thinks, from his own personal experience in handling skins, that he would have no difficulty whatever in separating the skins

of the Northwest catch from the skins of the Alaska catch by reason of the fact that they are the skins almost exclusively of females, and also that the fur upon the bearing female seals is much thinner than upon the skin of the male seals, the skin of the animal while pregnant being extended and the fur extended over a large area.

Charles J. Hagne (*ibid.*, p. 207): Capt. Hagne is a citizen of the United States and a master mariner by occupation. He had cruised steadily in Alaskan waters since the year 1878. He had sailed principally about the various parts of the Aleutian Islands, as far west as Attu, to which island he had made about twenty trips from Unalaska, principally in the spring and fall of the year. This is his testimony upon the point now under consideration:

The main body of the fur-seal herd bound to and from the Pribilof Islands move through the passes of the Fox Islands, Unimak on the east and the West Pass of Unimak on the west, being the limits between which they enter Behring Sea in any number. I do not know through what passes the different categories move or the times of their movements. Rarely see fur-seals in the Pacific between San Francisco and the immediate vicinity of the passes. I think the fur-seal herds of the Commander and Pribilof Islands are separate bodies of the fur-seal species, whose numbers do not mingle with each other. In the latter part of September, 1867, in the brig *Kentucky*, making passage between Petropaulowski and Kodiak, I observed the Commander Islands seal herd on its way from the rookeries. They moved in a compact mass or school, after the manner of herring, and were making a westerly course towards the Kurile Islands. The seals which I have observed on their way to the Pribilof Islands do not move in large schools; they struggle along a few at a time in a sort of a stream and are often seen sleeping in the water and playing. There are no fur-seal rookeries in the Aleutian Islands that I know of; in fact, I have never heard of any in the region besides those on the several well-known Seal Islands of Bering Sea.

H. Harmsen (*ibid.*, p. 442): Capt. Harmsen had been the master of a ship since 1880 and engaged in the business of hunting seals in the Pacific and Bering Sea since 1877. The following is an abstract from his testimony:

Q. In your opinion, do the seals on the Russian side intermingle with those on the Pacific side or are they a separate herd?—A. No, sir; they do not come over this way. They are not a different breed, but they keep over by themselves; at least I don't think so. They follow their own stream along there. There is so much water there where there are seals, and so much where there are not. They are by themselves.

Samuel Kahoorof (*ibid.*, p. 214): Kahoorof is a native of Attu Island, 52 years of age, and a hunter of the sea otter and blue fox. He had lived

in the same place all his life. We extract that part of his testimony which bears upon the question now under immediate consideration:

Have seen only three fur-seals in this region in twenty years. Saw them in May, 1890, traveling along the north side of Attu Island, about 5 miles off shore, and making a northwesterly course. They were young males, I think. Fur-seals do not regularly visit these islands now, but about twenty-five or thirty years ago I used to see small squads of large seals during the month of June feeding and sleeping about the kelp patches off the eastern shores of Attu and Agattu Islands. They came from the southward and traveled in a northwesterly direction. Never saw any fur-seals east of the Semichi Islands and do not think that those of the Commander Islands herd go farther to the eastward than that. They decreased in numbers gradually, and during the last twenty years I have only seen the three above mentioned. Have never seen a nursing or mother cow or black or gray pup in this region, and do not think they ever visit it.

John Malowansky (*ibid.*, p. 198): Mr. Malowansky is a resident of San Francisco, an American citizen, but a Russian by birth. He was, at the time of testifying, a merchant by profession and an agent for the Russian Sealskin Company. He resided on the Commander Islands in 1869, 1870, and 1871, and was then engaged in the sealing business. He was there again in 1887, as agent of the company. He formerly lived in Kamtchatka and frequently visited the Commander Islands between 1871 and 1887. He was an expert in all matters relating to the fur-seal trade, especially on the Russian side of the Bering Sea. The following is an extract from his testimony:

The seals of the Commander Islands are of a different variety from those of the Pribilofs. The fur is not so thick and bright and is of a somewhat inferior quality. They form a distinct herd from that of St. Paul and St. George, and in my opinion the two do not intermingle.

I was present as interpreter when the English Commissioners were taking testimony on Bering Island. They examined among others, when I was present, Jeffm Snigeroff, Chief of Bering Island, he being the person selected by them there from which to procure the testimony relating to the habits and killing of seals. This Snigeroff testified that he had lived on the Pribilof Islands for many years and knew the distinctive characteristics of both herds (Commander and Pribilof) and their habits and that he removed from thence to Bering Island. He pointed out that the two herds have several different characteristics and stated that in his belief they do not intermingle.

Filaret Prokopief (*ibid.*, p. 216): Prokopief is a native of Attu Island, 23 years of age, and the agent and storekeeper at that place of the Alaska Commercial Company. His occupation was that of hunter for sea-otter and fox, but never for fur-seal. This occupation he pursued until the time when he was made agent. His hunting ground was Attu, Agattu and the Semichi Islands. This is his testimony:

I never saw but one fur-seal in the water. It was a young male which was killed in this bay in September, 1884. I do not know of any fur-seal rookery or other places where fur-seals haul out on the land to breed or rest in the Aleutian Islands, nor where the old bull fur-seals spend the winter. I do not know at what time or by what routes the seal herds move to and from the Bering Sea; have heard old hunters say the Commander Islands herd used to pass close to the western shores of these islands on their way north.

Elijah Prokopief (*ibid.*, p. 215) is a native of Amchitka Island of the Aleutian chain; 52 years of age; had been a hunter all his life, but had never hunted or killed a fur-seal. His hunting ground was about Attu, Agattu, and the Semichi Islands. His testimony is as follows:

Fur-seals do not regularly frequent these regions, and I have seen none but a few scattering ones in twenty years. Thirty years ago, when the Russians controlled these islands, I used to see a few medium-sized fur-seals, one or two at a time, in the summer, generally in June, traveling to the northwest, and bound, I think, for the Commander Islands. The farthest east I have ever seen them was about 30 miles east of the Semichi Islands; do not think those going to the Commander Islands ever go farther east than that. Those most seen in former times were generally feeding and sleeping about the kelp patches between Attu and Agattu, and the Semichi Islands, where the mackerel abounds. They decreased in numbers constantly, and now are only seen on very rare occasions. Have seen but half a dozen in the last twenty years; they were large seals—bulls, I judged from their size—traveling to the northwest, about 30 miles east of the Semichi Islands. This was in May, 1888.

Have never seen any pups, black or gray, or nursing female seals in this region, and do not think they ever visit it. Do not know of any rookeries in the Aleutian Islands, nor any places where fur-seals haul out regularly on the land or kelp to breed or rest except the Russian and American seal islands of Bering Sea. Do not know where the old bull fur-seals spend the winter, nor what route the fur-seal herds take to and from the Commander and Pribilof islands, nor at what times the herds pass to and from. Am quite sure the herds do not come near enough together to mingle in these regions. Have never known of fur-seals being seen between Amchitka and a point 30 miles east of the Semichi Islands. Do not think there are now as many fur-seals as there were thirty years ago, but do not know the cause of the decrease. Sealing schooners do not regularly visit these islands. Last August (1891) three of them came in here to get water, but only stayed a few hours each; they had been to the Commander Islands and were going south.

Gustave Niebaum (*ibid.*, p. 202): The testimony of Mr. Niebaum has been cited above and his qualifications given. Upon the subject of the alleged or possible commingling of the different herds, he says (*ibid.*, p. 204):

I am satisfied that the seal herds respectively upon the Pribilof group, the Commander Islands and Robben Bank, have each their

own distinctive feeding grounds and peculiar grounds of migration. No doubt they are of the same species, but there is a marked difference in the fur of the skins from the respective places, which can be distinguished by experts.

O. A. Williams (*ibid.*, p. 535): Mr. Williams is a citizen of the United States, a resident of the city of New London, in the State of Connecticut, and was at the time of testifying 63 years of age. He had been largely engaged for a period of upwards of forty years in the whaling and sealing business, in which he had employed upward of twenty-five vessels. He says that there is no intermingling of the herds.

The testimony of Alexander McLean (*ibid.*, p. 436) is to the same effect. Mr. McLean is a master mariner and had been engaged for ten years, at the time of making his deposition, in the business of hunting seals in the Pacific or Bering Sea.

To the like effect is the testimony of Daniel McLean (*ibid.*, p. 443). He, too, is a master mariner, and is of opinion that the Russian and Alaskan herds are different herds of seals altogether. His testimony is as follows:

Q. In your opinion, do the seals on the Russian side intermingle with those on the Pacific side? A. No, sir; I do not think so. They are different seals in my opinion.

It is only just to add that the British Commissioners virtually make the admission that these herds are separate and distinct, although the inference may be drawn, from some of their statements, leading to a contrary conclusion, when the practical question arises in connection with an appreciable difference in the value of skins.

Thus, for instance, the suggestion is made of a *probability* in the future, in a course of years, that a continued "harassing" of one group might result in a corresponding gradual accession to the other, by which it is no doubt intended to convey the idea that unless the killing on the Pribilof Islands is discontinued the seals will migrate and adopt a Russian domicile (Sec. 453).

But the same paragraph admits that "the fur-seals of the two sides of the North Pacific belong in the main to practically distinct migration tracts." They add that it is not believed that any voluntary or systematic movement of fur-seals takes place from one group of breeding islands to the other (Sec. 453). See also section 198 of British Commissioners' report, that "while there is every reason to believe that the seals become more or less commingled in Behring Sea during the sum-

mer [a purely gratuitous assumption], the migration routes of the two sides of the North Pacific are essentially distinct." (See also Secs. 170, 198, 216, 220.)

Without any evidence, then, on the side of the United States, it might be asserted, on the Report of the British Commissioners alone, that any intermingling of the two herds is abnormal and exceptional, although these gentlemen are inclined to think that in the remote future this separation may disappear.

(C) THE ALASKAN FUR-SEALS HAVE BUT ONE HOME, NAMELY, THE PRIBILOF ISLANDS. THEY NEVER LEAVE THIS HOME WITHOUT THE ANIMUM REVERTENDI, AND ARE NEVER SEEN ASHORE EXCEPT ON THOSE ISLANDS.

The testimony as to this fact is uncontradicted except by the curious and utterly unsupported statement of the British Commissioners that the animals actually enjoy and occupy two homes; that is, they have a winter domicile, which is not given, except by a vague and general designation (British Commissioners' Report, Sec. 27), and a summer place of resort, which is the Pribilof Islands. *There is no pretense that they ever land elsewhere.* The force of this original suggestion of a double residence would be much increased if the slightest indication were given to enable us to test the accuracy and to aid the Commissioners in satisfying the world of scientists that a grave error has heretofore been committed and continuously accepted. But as we are endeavoring to treat the assertion as seriously and respectfully as possible, we submit that in the face of absolute and uncontradicted proof, corroborated by general scientific experience, we are not bound to devote any considerable space to the demonstration that the fact must be taken to be as we have stated it.

In fairness to the Commissioners for Great Britain, it may be proper to call attention to their own language, noting, however, the singular process by which they make the migration of the seals commence *at an uncertain point in the Pacific* to reach their well-established home and place of nativity in the north.

The absurdity chargeable upon the British Commissioners of thus beginning at an uncertain point to reach a certain one is shown by Capt. Scammon, who has been an officer in the United States Revenue-Marine Service since 1863. Mr. Scammon is also the author of the work entitled "The Marine Mammals of the Northwestern Coast

of North America," published by J. H. Carmany & Co., San Francisco, 1874. He says:

The certainty that the seals caught in the North Pacific are in fact a portion of the Pribilof herd, and that all are born, and reared for the first few months, upon the islands of that group, naturally leads the observer to regard them as quite domesticated and belonging upon their island home. *The more orderly way to describe them, therefore, would be to commence with their birth upon the island and the beginning of their migrations, rather than at the end of some one of their annual rounds away from home.*

We now quote the language of the Report of the British Commissioners:

The fur-seal of the North Pacific Ocean is an animal in its nature *essentially pelagic*, which, during the *greater part of each year*, has no occasion to seek the land and very rarely does so. *For some portion of the year, however, it naturally resorts to certain littoral breeding places, where the young are brought forth and suckled on land.* It is gregarious in habit, and, though seldom found in defined schools or compact bodies at sea, congregates in large numbers at the breeding places. (Sec. 26.)

Then they describe the migrations and continue:

The fur-seal of the North Pacific may thus be said, in each case, to have two habitats or homes between which it migrates, both equally necessary to its existence, under present circumstances, the one frequented in summer, the other during the winter.

Unless the vast expanse of sea between the Aleutian Islands and California may be considered a *winter habitat*, it is difficult to see upon what foundation these gentlemen have felt justified in making the statement of a double home. The object of such an argumentative assertion is too plain to require consideration, at least in connection with this point.

The truth upon this question of habitat or home is as stated by the American Commissioners in their report. They use the following language:

The Pribilof Islands are the home of the Alaskan fur-seal (*Callorhinus ursinus*). They are peculiarly adapted, by reason of their isolation and climate, for seal life, and because of this peculiar adaptability were undoubtedly chosen by the seals for their habitation. The climatic conditions are especially favorable. The seal, while on land, needs a cool, moist, and cloudy climate, sunshine and warmth producing a very injurious effect upon the animals. These requisite phenomena are found at the Pribilof Islands, and nowhere else in Bering Sea or the North Pacific save at the Commander (Komandorski) Islands. (Case of the United States, p. 89.)

What might be the result if the seals were prevented from landing to drop their young at the Pribilof Islands is wholly a matter of conjecture. It would seem from the testimony in the Case quite certain that the pregnant females would lose their young if they were on the point of delivery when reaching the islands, and if driven off by man, or by accident; they certainly would be exposed to great danger while looking for another home, even assuming this exercise of sound judgment *in extremis* to be probable. Such difficulties do not, however, trouble the Commissioners, who are satisfied that if they were to be debarred from reaching the islands now chiefly resorted to for breeding purposes, they would speedily seek out other places upon which to give birth to their young. (Report of British Commissioners, Sec. 28.)

This is based upon "experience recorded elsewhere." We fail to find any such recorded experience which would justify so wild an assertion. On the contrary, it appears that when the heavy females have been debarred by ice from the land they were delivered in the water and the young perished.

The experience of the South Sea seals is directly opposed to this theory. Exclusion from their usual haunts meant destruction. Why did they not when shut off from the resort of their choice seek out a new home, with the proper conditions of climate, soil, and food, to take the place of the old home from which man had driven them? We know of no reasonable theory upon which it may be plausibly argued that the Pribilof seals would, under the like circumstances, act differently.

III.—MOVEMENTS OF THE SEALS AFTER THE BIRTH OF THE YOUNG.

It being conceded that the fur-seals known as the Alaska seals breed, "at least for the most part" (Report of British Commissioners, Sec. 27), on the Pribilof Islands in summer, it becomes important to know what their movements may be after the birth of the young. There is no very material difference between the statements of the Commissioners of the respective governments on this point.

The breeding males begin to arrive on the Pribilof Islands at varying dates in May and remain continuously ashore for about three months, after which they are freed from all duties on the breeding rookeries and only occasionally return to the shores. The breeding females arrive, for the most part, nearly a month later, bearing their young immediately on landing, and remain ashore, jealously guarded by the males, for several weeks, after which they take every opportunity to play in the water close along the beaches, and about a month

later they also begin to leave the islands in search of food and migrate to their winter habitat. The young males and the young females come ashore later than the breeding seals, and at more irregular dates, and haul out by themselves. Lastly, the pups of the year born in June and July commence to pod, or herd together, away from their mothers, towards the middle or end of August, and after that frequent the beaches in great numbers and bathe and swim in the surf. They remain on the islands until October, and even November, being among the last to leave (Report of the British Commissioners, Sec. 30).

The United States Commissioners make the following statement, which is corroborated by abundant evidence. The bulls are the male seals from five or six to twenty years of age, and weigh from *four hundred to seven hundred pounds*. They arrive on the breeding ground in the latter part of April or the first few days of May, but the time is, to a certain extent, dependent upon the going out of the ice about the island. (Case of the United States, p. 108.) Toward the latter part of May or first of June, the cows begin to appear in the waters adjacent to the island and immediately land upon the breeding ground. The great majority, however, do not haul up until the latter part of June, and the arrivals continue until the middle of July.

Some of the bulls at this time (about the first of August) begin to leave the islands, and continue going until the early part of October. [Case of United States, p. 112, citing witnesses as to this point.]

The bachelor seals, or nonbreeding males, ranging in age from 1 to 5 or 6 years, begin to arrive in the vicinity of the islands soon after the bulls have taken up their positions upon the rookeries, but the greater number appear toward the latter part of May. They endeavor to land upon the breeding grounds, but are driven off by the bulls and compelled to seek the hauling grounds.

As to the departure of the seals from their home on the Pribilof Islands, there does not seem to be any question that the statement in the United States Commissioners' Report is correct.

The length of time that a pup is dependent upon its mother, as heretofore stated, compels her to remain upon the island until the middle of November, when the cold and stormy weather induces her to start, her pup being then able to support itself (pp. 119, 120).

The bachelor seals generally leave at the same time as the cows and pups leave the island, though a few bachelors always are found after that period (p. 122 of the case of United States).

The Alaskan herd has had but one breeding place, which is the Pribilof Islands. While there is no express contradiction as to this

in the Report of the British Commissioners, it may be interesting to cite some of the proof in support of this assertion.

(a) The islands are in every particular adapted by climate and conditions to the purpose. While it is suggested, as we have seen above, by the British Commissioners, that the seals would find no difficulty in procuring another suitable place for breeding and for passing the summer months, this is manifestly a conjecture and need not bedwelt upon.

(b) There is no evidence that the animal has ever resorted to other places, but all the evidence before this High Tribunal of Arbitration leads to the inference above stated.

The language of the Case on the part of the United States is as follows (p. 89):

The climatic conditions are especially favorable. The seal, while on land, needs a cool, moist, and cloudy climate, sunshine and warmth producing a very injurious effect upon the animals. These requisite phenomena are found at the Pribilof Islands and nowhere else in Bering Sea or the North Pacific, save at the Commander (Komandorski) Islands.

This is abundantly sustained by the proof. See upon this point the testimony of Charles Bryant (Appendix to Case of the United States, Vol. II, p. 4), Capt. Bryant having been long engaged in whaling and having acted as Special Treasury Agent at the Pribilof Islands. Also Samuel Falconer (*ibid.*, p. 164). Mr. Falconer had had long experience as Treasury Agent on the islands, and otherwise, and is a fully competent witness upon this point. He assigns the reason for the selection of this breeding locality by the seals in the following language:

The reason the seals have chosen these islands for their home is because the Pribilof group lies in a belt of fog, occasioned by the waters of the Arctic Ocean coming down from the north and the warmer waters of the Pacific flowing north and meeting at about this point in Bering Sea. It is necessary that the seals should have a misty or foggy atmosphere of this kind while on land, as sunshine has a very injurious effect upon them. Then, too, the islands are so isolated that the seal, which is a very timid animal, remains here undisturbed, as every precaution is taken not to disturb the animals while they are on the rookeries. The mean temperature of the islands is during the winter about 26° F., and in summer about 43°. I know of no other locality which possesses these peculiarities of moisture and temperature. The grounds occupied by the seals for breeding purposes are along the coast, extending from high-water mark back to the cliffs, which abound on Saint George Island. The young males or bachelors, not being allowed to land on these breeding places, lie back of and around these breeding grounds on areas designated hauling grounds.

Captain Morgan says (*ibid.*, p. 61):

I believe that the cause the seals choose these islands for their home is because of the isolation of these Pribilof Islands and because the climatic condition of these Pribilof Islands is peculiarly favorably to seal life. During the time the seals are upon land the weather is damp and cool, the islands being almost continually enveloped in fogs, the average temperature being about 41° F. during the summer.

See, too, Daniel Webster, local agent for the North American Commercial Company, and stationed on St. George Island, who uses the following language (*ibid.*, p. 180):

These islands are isolated and seem to possess the necessary climatic conditions to make them the favorite breeding grounds of the Alaskan fur-seals, and it is here they congregate during the summer months of each year to bring forth and rear their young.

Mr. Redpath, a resident of St. Paul Island, Alaska. He had resided on the seal islands of St. Paul and St. George since 1875, that is to say, at the time of giving his deposition, some seventeen years. He testified as follows upon this point (*ibid.*, p. 148):

The Alaskan fur-seal is a native of the Pribilof Islands, and, unless prevented, will return to those islands every year with the regularity of the seasons. All the peculiarities of nature that surround the Pribilof group of islands, such as low and even temperature, fog, mist, and perpetual clouded sky, seem to indicate their fitness and adaptability as a home for the Alaskan fur-seal; and with an instinct bordering on reason, they have selected these lonely and barren islands as the choicest spots of earth upon which to assemble and dwell together during their six months stay on land; and annually they journey across thousands of miles of ocean, and pass hundreds of islands, without pause or rest, until they come to the place of their birth. And it is a well-established fact that upon no other land in the world do the Alaskan fur-seal haul out of water.

IV.—THE ENTIRE OFFICE OF REPRODUCTION AND REARING OF YOUNG IS AND MUST BE PERFORMED ON LAND.

“The act of coition takes place upon land” (Case of the United States, p. 110). The correctness of this assertion is settled beyond controversy by the overwhelming proof furnished by the United States Commissioners. But had they produced no evidence whatever, it is clear that the data furnished by the British Commissioners themselves are insufficient to cast reasonable doubt upon the proposition.

(a) The British Commissioners, in their report, begin with the broad (and incorrect) statement that the fur-seal is an animal in its nature

"essentially pelagic," which "for some portion of the year, however, *naturally* resorts to certain littoral breeding places, where the young are brought forth and suckled on land" (Sec. 261). Why it is and how it happens that an "essentially pelagic" animal should *naturally* resort to land for the most important function of its life does not appear, and yet the exceptional singularity of the circumstance might have made explanation reasonable. It is enough for the present purpose to give, in a word, the explanation of this practice of resorting to land. It may be found in the universally conceded fact, that *when the young happen to be born at sea they perish*. Ability to swim does not come spontaneously or naturally to this "essentially pelagic" animal. It is part of its education, and is not always acquired without difficulty. The race would be at once extinguished, by failure of living offspring, if it were confined to its own element.

Passing this anomaly for the present and again seeking information from the British Commissioners' Report, we learn that the *breeding males* begin to arrive on the Pribilof Islands at varying dates in May and remain continuously on shore *for about three months, after which they are freed from all duties on the breeding rookeries*. * * * The *breeding females* arrive for the most part nearly a month later, bearing their young *immediately on landing and remaining ashore, jealously guarded by the males for several weeks* (Report of British Commissioners, Sec. 30).

It is plain that the impregnation of the female takes place during these months or weeks. The "jealous" care of the breeding males, their sojourn on the land "*until they are freed from all duties on the shore,*" their patient waiting for the females; all these facts show that there is a regular season of coition, which extends as they admit from May until July or August (see Report of British Commissioners, Sec. 306), and that the act takes place on the land.

If this assertion needs further demonstration, it may be readily furnished.

Assuming, as we must, and as the British Commissioners themselves declare, that it is *natural* for the seal to resort to land for the purpose of bringing forth and suckling its young, it being, moreover, uncontradicted that there is but one breeding place for this herd of seals, viz., the Pribilof Islands, it is indisputable that the period of coition and impregnation must so correspond with the period of return to the islands as to enable the mother to time the period of delivery with that of reaching land. Nature is a wise and careful monitor in her dealings

with these and other animals and they heed her teachings. Nothing is left to chance in the all-important matter of perpetuating the species. Coition and impregnation at sea and at irregular times would simply mean irregularity of birth and consequent destruction. If the females were impregnated at any other season their young would be born at sea, and, notwithstanding their "essentially pelagic nature," would inevitably perish.

This is further demonstrated by inexorable figures. The breeding females, say the British Commissioners, arrive at the islands nearly a month later than the males—that is to say, in June—and "immediately" drop their young. Given the date of birth (some time in June or July) *and the period of gestation* (about fifty weeks) (Case of the United States, p. 113), it is not difficult to fix the season of fertilization, *but it is impossible to fix it at any other time than the period of the breeding mothers' stay at the islands.* Such evidence as this outweighs the most ingenious and finely drawn conjecture. Even were it possible to show occasional acts of coition in the water after the females have been "released by their jealous male companions" on land, the fact would only be interesting from a scientific standpoint. It would not practically affect the question nor alter the fact that the coition which results in fertilizing the female is performed on land, as a result of natural laws, the violation of which to any considerable extent must eventually endanger the existence of, if not promptly and absolutely destroy, the race.

The British Commissioners, undeterred by these very obvious objections and misled, no doubt, by inaccurate and undisclosed information, assert that there is a certain class of "immature males," known as "half bulls" or "reserves," that poach upon the preserves of the seniors and cover many of the females which escape the attention of the older males upon the rookery grounds and in *such cases* the act of coition is *usually accomplished at sea!* (Sec. 287.)

It is unfortunate that an assertion inconsistent with scientific investigation and completely refuted by abundant proof should have been thus lightly made and suffered to rest upon mere affirmation. The statement is certainly not correct; but, even if it were, it merely states, and this most vaguely, that an irregular practice is sometimes followed in exceptional cases.

But the important point that the "breeding females" are only served by the "breeding males" on land is shown by the report of the British Commissioners themselves:

The remaining—and, at the time in question, most important—class is that of the breeding females. These, *sometime after the birth of the young and the subsequent copulation with the male*, begin to leave the rookery ground and seek the water. This they are able to do because of the lessened interest of the beach masters in them, and more particularly after many of the beach-masters themselves begin to leave their stands. (Sec. 306.)

In section 309 Bryant is quoted thus:

Bryant, after describing the relaxation in watchfulness of the male after impregnation has been accomplished, says of the female: "From that time she lies either sleeping near her young or spends her time either *floating or playing in the water near the shore*, returning occasionally to suckle her pup."

This opinion is especially important, as the same person is relied upon in another place as authority to show that the habit of coition on land has been somewhat modified since 1874. It certainly seems strange that if coition on land was the rule and the exceptions rare prior to 1874 "coition on land seems *not to be the natural method*." (Sec. 296.) There is evidently an error, either in the transcription or in the original statement. Mr. Bryant adds that "only rarely—perhaps in three cases out of ten—is the attempt to copulate *under such circumstances* effectual." This is in direct contradiction to the conceded and established fact that the breeding females are fertilized on land. It is difficult to suppose that Nature did not teach these animals from the earliest date the most "natural" way of satisfying their instinct and perpetuating their species. Perhaps the British Commissioners would not have been driven to the extremity of quoting such statements were it not for the necessity of supporting their theory, viz, the mischievous *diminution of the males by slaughter on the islands*.

Taking these statements altogether, they clearly prove the *habits* of the breeding animal to be as we have contended, subject possibly to alleged exceptions which, even if firmly established, would not impair the substance of the contention. It might, perhaps, be safe to rest this branch of the case at this point and to submit to this learned Tribunal that the inconsistencies and self-repugnances of the Report are such as to deprive it of all value as a guide upon this branch, at least, of the discussion. We shall, however, even at the risk of importunity, pursue the subject still further.

The statement in the Case of the United States as to the habits of the seals in the act of reproduction is as follows (p. 110):

The act of coition takes place upon land, which by reason of the formation of the genital organs is similar to that of other mammals. It is violent in character and consumes from five to eight minutes.

This statement is not a mere affirmation unsupported by authority. It is based in part upon the evidence of which we here give abstracts:

Mr. Joseph Stanley-Brown (Appendix to Case of the United States, Vol. II, p. 14), a geologist by profession, and as such employed in the United States Geological Survey, says:

Pelagic coition I believe to be impossible. The process upon land by reason of the formation of the genital organs is that of a mammal, is violent in character, and consumes from five to eight minutes. The relative sizes of the male and female are so disproportionate that coition in water would inevitably submerge the female and require that she remain under water longer than would be possible to such an amphibian. I have sat upon the cliffs for hours and watched seals beneath me at play in the clear water. It is true that many of their antics might be mistaken for copulation by a careless observer, and this may have given rise to the theory of pelagic coition. I have never seen a case of the many observed which upon the facts could properly be so construed.

Mr. John M. Morton, United States shipping commissioner at San Francisco, went to Alaska in 1870, arriving at St. Paul Island in October. He remained until the close of the season in the following year. In 1872 he visited all the trading posts of the Alaska Commercial Company. The summer of 1873 he spent on the Island of St. George. In 1875 and 1876 he again visited and spent both summers on St. Paul Island. He was at all times greatly interested in observing the movements and habits of these animals, and scarcely a day passed that he did not visit one or more of the rookeries. During the seasons of 1877 and 1878, while serving in the capacity of special Treasury Agent, he devoted his best attention and study to this subject.

This is his language in his sworn deposition which appears at page 67, Volume II, of the Appendix to the Case of the United States:

I desire also to express my belief concerning the seal life that *the act of copulation can not be successfully performed in the water*. Those who have witnessed its accomplishment on the rookeries must coincide with such opinion. A firm foundation for the support of the animals, which the ground supplies and the water does not, is indispensable to oppose the pushing motion and forceful action of the posterior parts of the male which he exerts during the coition. The closest observation which I have been able to give to the movements and habits of the seals in the water has furnished no evidence to controvert the above opinion.

S. R. Nettleton, a resident of Seattle, Wash., was appointed Special Agent of the Treasury Department in the autumn of 1889, at which time he went to the island of St. Paul in the performance of his duties. He returned to the States in 1890, and in 1891 returned to St. Paul Island, and remained there through June and July, and was then transferred to the island of St. George, where he remained until June, 1892. In the discharge of his duties as Treasury agent, he made such observations as could be taken from the breeding rookeries and the waters immediately adjacent thereto. His statement of facts is based upon personal observation as well as the information received from the natives of such islands and the white men resident thereon.

This is his language (Appendix to Case of the United States, Vol. II, p. 75):

Referring to the question as to whether pelagic coition is possible, I have to say that I have never seen it attempted, but from my observations I have come to the conclusion that pelagic coition is a physical impossibility.

Dr. H. H. McIntyre, superintendent for the lessees of the Pribilof Islands, during the entire term of their lease, visited the islands twice in the summer of 1870, and there he remained constantly from April, 1871, until September, 1872, and thereafter went to the islands every summer from 1873 until 1889, inclusive, excepting 1883, 1884, and 1885. His opportunities for observation were excellent, for he remained on the islands four months, from May until August, in each season, supervising the annual seal catch, examining the condition of seal-life, studying the habits of seals, and, in brief, doing such work as the interests of the lessees seemed to demand. He says (Appendix to Case of the United States, Vol. II, p. 42):

It has been said that copulation also takes place in the water between these young females and the so-called "nonbreeding males," but with the closest scrutiny of the animals when both sexes were swimming and playing together under conditions the most favorable in which they are ever found for observation, I have been unable to verify the truth of this assertion. After coitus on shore, the young female goes off to the feeding grounds or remains on or about the beaches, disporting on the land or in the water as her inclination may lead her. The male of the same age goes upon the "hauling grounds" back of or beside the rookeries, where he remains the greater part of the time, if unmolested, until nearly the date of his next migration.

Mr. Arthur Newman had lived, at the time of his deposition, over twenty years on the Aleutian Islands. For eight years he had been

agent for the Alaska Commercial Company, at Chernofsky, and for ten years he had acted in the same capacity at Umnak. He had every opportunity, as will appear from his deposition on page 210, Vol. II, of the Appendix to the Case of the United States, to observe the habits of the seals.

This is his language:

I have seen seals sleeping on kelp and feeding about it, but have never seen them copulate anywhere except on a rookery. I do not believe that pups born on kelp could be properly nursed and brought up. I do believe that it is necessary to their successful existence that they be born on land, since they can not swim at birth.

Norman Hodgson (*ibid.*, p. 367), a resident of Port Townsend, in the State of Washington, and a fur-seal hunter by occupation, gives many interesting details as to the habits of the seal. On the point now under consideration, he says:

I do not believe it possible for fur-seals to breed or copulate in the water at sea, and never saw or heard of the action taking place on a patch of floating kelp. I have never seen a young fur-seal pup of the same season's birth in the water at sea on a patch of floating kelp, and, in fact, never knew of their being born anywhere save on a rookery. I have, however, cut open a gravid cow and taken the young one from its mother's womb alive and crying. I do not believe it possible for a young fur-seal pup to be successfully raised unless born and nursed on a rookery. I have seen fur-seals resting on patches of floating kelp at sea, but do not believe they ever haul up for breeding purposes anywhere except on the rookeries.

Charles Bryant, who had spent considerable time on the Islands and had acted during a period of nine years as special agent of the Treasury Department, says (*ibid.*, p. 6):

In watching the seals while swimming about the islands, I have seen cases where they appeared to be copulating in the water, but I am certain, even if this were the case, that the propagation of the species is not as a rule effected in this way, the natural and usual manner of coition being upon land.

Capt. James W. Budington, who testified to his experience, which was considerable, in seal hunting at Cape Horn and in the Southern Atlantic Ocean, say (*ibid.*, p. 595):

I am also convinced that copulation takes place on land before they migrate, the period of gestation being about eleven months.

Samuel Falconer, a witness whose experience and qualifications have been mentioned heretofore, says (*ibid.*, p. 165):

As a general rule, the impregnation is by the bull to whose harem she belongs, and not by the young males, as has sometimes been stated. These young males also pursue a female when she is allowed to leave the harem and go in the water, but she refuses them. I am positive from my observations that copulation in the water could not be effectual, and would be a *most unnatural occurrence*.

John Armstrong, for a long time an employé in the Alaskan service in connection with the sealeries testified with much caution, and is the only one of the witnesses who does not speak with absolute confidence. His testimony is as follows (*ibid.*, p. 2):

I am asked whether the seals copulate in the water. It is a question that is often discussed at the islands, and neither the scientific observers nor the unscientific are able to agree about it. I have seen seals in position when it seemed to be attempted, but doubt whether it is effectually accomplished. If it were, I think we should see pups sometimes born late and out of season, but such is not the case.

V.—THE PUP IS ENTIRELY DEPENDENT UPON ITS MOTHER FOR NOURISHMENT FOR SEVERAL MONTHS AFTER ITS BIRTH.

THE COWS WILL SUCKLE THEIR OWN PUPS ONLY AND THE SUCKLING IS DONE ONLY ON LAND.

As in the case of all mammalia, the young must be dependent for nourishment during a certain period upon the milk furnished by the mother. The proof, moreover, is uncontradicted, and the British Commissioners admit that the suckling is done only on land. There is a question raised, however, which it may be useful to discuss, namely: Are the pups suckled only by their mothers or do these act indiscriminately and give nourishment to such young as they may happen to find conveniently at hand? It is asserted in the Case of the United States that these animals constitute no exception to the general rule by which the mother recognizes her own offspring and nourishes it alone. This is the language of the Case (page 114):

A cow, as soon as a pup is brought forth, begins to give it nourishment, the act of nursing taking place on land and never in water, and she will only suckle her own offspring. This fact is verified by all those who have ever studied seal life or had experience upon the islands.

William Brennan (Appendix to Case of the United States, Vol. II, p. 359). The testimony of Mr. Brennan, a native of Great Britain and a resident, at the time of making his deposition in 1892, of Seattle, in the State of Washington, is interesting and enters into minute details,

which could only be furnished by a person who had practically studied the subject. He says:

In May the bulls commence to haul up on the rookeries, and the cows come three or four weeks later. The bulls choose such ground as they mean to hold through the summer, fight savagely, and the strongest wins. Each has his own family, and should a stranger approach, there is war. On the rookeries one may see all classes of seals, apart from each other, the bulls and breeding cows in one place and the young in another. The pups are born on the rookeries, and remain with their mothers, living wholly upon their mother's milk until they can go into the sea and care for themselves. There is nothing on the beach for the old ones to eat, and they go several miles from the rookeries out to sea to obtain food. When the pups are born they can not swim, and the mothers take them to the water's edge, where one can see thousands paddling and struggling in the surf. The noise made by the mothers crying for their pups, and the bleating of the pups in answer, make a constant roar. The cow is three years old before she bears young. The pups are about forty-five days old before they can go into the water, but they nurse the mother as long as they stay on the island.

This testimony, if reliable, and there is no reason to dispute its accuracy, establishes the dependence of the pup upon its mother not only for food, but for care and instruction in swimming.

Joseph Stanley-Brown, whose contributions to the subject of fur-seal life and their habits are extremely valuable and are frequently referred to in the Case of the United States, is very emphatic and satisfactory upon this subject. His qualifications have already been stated in connection with other propositions. He says (*ibid.*, pp. 15-16):

For the first few days, and possibly for a week, or even ten days, the female is able to nourish her young or offspring, but she is soon compelled to seek the sea for food, that her voracious young feeder may be properly nourished, and this seems to be permitted on the part of the male, even though under protestation. The whole physical economy of the seal seems to be arranged for alternate feasting and fasting, and it is probable that in the early days of its life, the young seal might be amply nourished * * * without herself resorting to the sea for food.

The female gives birth to but a single pup. The labor is of short duration, and seems not to produce great pain. In the first weeks of its life, the pup does not seem to recognize its mother, but the latter will recognize and select her offspring among hundreds.

The young, upon being born, have all the appearance of pups of a Newfoundland dog with flippers. On emerging from their warm resting place into the chill air, they utter a plaintive bleat not unlike that of a young lamb. The mother fondles them with many demonstrations of affection, and they begin nursing soon after their birth. * * *

The young seals require the nourishing care of their mother for at least four months, and pups have been killed on the island late in November the stomachs of which were filled with milk. * * *

The pups are afraid of the water; they have to learn to swim by repeated efforts, and even when able to maintain themselves in the quiet

waters will rush in frantic and ludicrous haste away from an approaching wave. I have taken pups 2 or 3 weeks old and carried them out into still water and they awkwardly, but in terror, floundered toward the shore, although they could have escaped me by going in the other direction. In three trials, paddling in all about 60 feet, the pups became so exhausted that they would have been drowned had I not rescued them. If the pups, when collected in groups or pods near the shore were to be overtaken by even a moderate surf, they would be drowned, and such accidents to them do occur on the island before they have entirely mastered the art of swimming.

Charles Bryant has been quoted in connection with other propositions contained in the Case of the United States. He testifies upon this point as follows (*ibid.*, p. 5):

The pup is nursed by its mother from its birth so long as it remains on the islands, the mother leaving the islands at different intervals of time after the pup is 3 or 4 days old. I have seen pups, which I had previously marked with a ribbon, left for three or four days consecutively, the mothers going into the water to feed or bathe. A mother seal will instantly recognize her offspring from a large group of pups on the rookery, distinguishing it by its cry and smell; but I do not think a pup can tell its own mother, as it will nose about any cow which comes near it. A female seal does not suckle any pup save her own, and will drive away any other pups which approach her.

I am positive that if a mother seal was killed her pup must inevitably perish by starvation. As evidence of this fact, I will state that I have taken stray, motherless pups found on the sand beaches and placed them upon the breeding rookeries beside milking females and in all instances these pups have finally died of starvation.

Testimony such as this must be conclusive, except on the theory of absolute and intentional perjury. It is a satisfaction to the counsel for the United States to be able to state that no witness has been willing, so far as they know and so far as appears from the British Commissioners' Report, to put himself upon record, with or without oath, as directly contradicting these emphatic statements.

John Fratis, a native of Ladrone Islands, went to St. Paul Island in 1869, married a native woman of that place and became one of the people. Was made a native sealer and resided on the island from that time on. His experience, therefore, is valuable. He says (*ibid.*, p. 108):

The pups are born soon after the arrival of the cows, and they are helpless and can not swim and they would drown if put into water. The pups have no sustenance except what the cows furnish and no cow suckles any pup but her own. The pups would suck any cow if the cow would let them. After the pup is a few days old the cow goes into the sea to feed, and at first she will only stay away for a few hours, but as the pup grows stronger she will stay away more and more until she will sometimes be away for a week.

Numerous other witnesses were called who agreed that the only means of sustenance for the pup while it remained on the island, that is, for three or four months after its birth, is its mother's milk, and that it would perish if deprived of the same. Upon this point the following testimony may be read:

William Healey Dall (*ibid.*, p. 23); Samuel Falconer (*ibid.*, p. 165); William S. Hereford (*ibid.*, p. 35); Nicoli Krukoff (*ibid.*, p. 135).

H. W. McIntyre says (*ibid.*, p. 136):

Within a few days after landing (it may be but a few hours or even minutes, as I have seen) the female gives birth to her young, but one being brought forth each year. The reported occasional birth of twins is not verified. These little ones (pups as they are called) are comparatively helpless, particularly awkward in movement, and, unlike the hair-seal, are unable to swim. They are nursed by the mother, who, after copulation has taken place, is permitted by the old male to go at will in quest of food. At about six weeks old, the young gather in groups and shortly after learn to swim, but depend for a long period upon the mother for sustenance; hence her destruction must result in the death of the young through starvation.

So, also, J. H. Moulton (*ibid.*, p. 72).

Mr. Noyes says (*ibid.*, p. 82):

The pup is entirely dependent upon its dam for sustenance, and when it is a few days old she goes into the sea to feed, returning at intervals of a few hours at first, and gradually lengthening the time as the pups grow older and stronger, until she will be, sometimes, away for a whole week. During these journeys, it is my opinion, she goes a distance of from 40 to 200 miles from the islands to feed; and it is at this time she falls a prey to the pelagic hunter.

Returned to the rookery, the cow goes straight to where she left her pup, and it seems she instantly recognizes the spot by smelling, and it is equally certain that the pup can not recognize its dam. I have often seen pups attempt to suck cows promiscuously, yet no cow will suckle any pup but her own.

J. C. Redpath (*ibid.*, pp. 148, 149):

No cow will nurse any pup but her own, and I have often watched the pups attempt to suck cows, but they were always driven off; and this fact convinces me that the cow recognizes her own pup and that the pup does not know its dam. At birth and for several weeks after, the pup is utterly helpless and entirely dependent upon its dam for sustenance; and should anything prevent her return during this period it dies on the rookery. This has been demonstrated beyond a doubt since the sealing vessels have operated largely in the Behring Sea during the months of July, August, and September, and which, killing the cows at the feeding grounds, left the pups to die on the islands.

At about 5 weeks old the pups begin to run about and congregate in bunches or "pods," and at 6 to 8 weeks old they go into the shallow

water and gradually learn to swim. They are not amphibious when born nor can they swim for several weeks thereafter, and were they put into the water would perish beyond a doubt, as has been well established by the drowning of pups caught by the surf in stormy weather. After learning to swim, the pups still draw sustenance from the cows, and I have noticed at the annual killing of pups for food, in November, that their stomachs were always full of milk and nothing else, although the cows had left the islands some days before. I have no knowledge of the pups obtaining sustenance of any kind except that furnished by the cows; nor have I ever seen anything but milk in a dead pup's stomach.

Daniel Webster asserts positively that the *death of every mother causes the death of her pup, which is entirely dependent upon her for its sustenance*. Mr. Webster's testimony is valuable not only for its intrinsic value, but because its reliability is vouched for by the British Commissioners themselves (Sec. 677).

It will be observed that all the witnesses cited above are men specially capable, of long experience and a knowledge of the subject sufficient to enlighten any court whose function it may be to ascertain the facts connected with seal life. Such testimony can not fail to be conclusive in the judgment of this Court, unless it should be rejected as willfully and intentionally false. No ground for such a wholesale imputation upon the character of apparently intelligent and reputable men can be suggested. The functions of every court of justice become impossible, and decisions on questions of fact must be left to the caprice of judges, if such testimony may be arbitrarily disregarded. Surely the conjectures and conclusions of an adversary unsupported by the slightest pretense of proof, in a legal sense, can not be deemed a sufficient ground for such a charge. However high may be the character of the British Commissioners for intelligence and integrity, their bald assertions can not take the place of those aids to judicial investigation which the experience of all civilized nations has shown to be indispensable. It would, indeed, be a difficult task for the Arbitrators to reach any conclusion as to the material questions of fact in this case if the example of the British Commissioners had been followed by the Commissioners of the United States and both sides had confined themselves to conjectural assertions and partial and unsatisfactory deductions from uncertain premises. A manifest disposition to perform the part of an advocate rather than the duty of an aid to the court in the ascertainment of the truth, must detract largely from the value of the work performed by the Commissioners for Great Britain.

VI.—THE COWS, WHILE SUCKLING, GO TO THE SEA FOR FOOD AND SOMETIMES TO DISTANCES AS GREAT AS ONE HUNDRED AND TWO HUNDRED MILES, AND ARE DURING SUCH EXCURSIONS EXPOSED TO CAPTURE BY PELAGIC SEALERS.

The statement in the Case of the United States is as follows (p. 115):

Necessarily, after a few days of nursing her pup, the cow is compelled to seek food in order to provide sufficient nourishment for her offspring. Soon after coition she leaves the pup on the rookery and goes into the sea, and as the pup gets older and stronger, these excursions lengthen accordingly until she is sometimes absent from the rookeries for a week at a time.

The absolute correctness of this statement is demonstrated in the evidence.

A cow nurses only her own pup. The importance of deciding this question correctly makes it necessary that we should give special attention to the evidence upon the subject. The British Commissioners have taken a different view and are without support in the general understanding of men as to the practice and probabilities in such cases. It is easy to demonstrate that the assertion on page 115 of the Case of the United States, to the effect above stated is borne out by overwhelming proof.

Kerrick Artomanoff (Appendix to Case of the United States, Vol. II, p. 100) says:

The mother seals know their own pups by smelling them and no seal will allow any but her own pup to suck her.

Thomas F. Morgan (*ibid.*, p. 62) says:

After birth a pup at once begins to suckle its mother, who leaves its offspring only to go into the water for food, which I believe from my observation consists mainly of fish, squids and crustaceans. In her search for food the female, in my opinion goes 40 miles or even further from the islands. The pup does not appear to recognize its mother, attempting to draw milk from any cow it comes in contact with; but a mother will at once recognize her own pup and will allow no other to nurse her. This I know from often observing a cow fight off other pups who approached her, and search out her own pup from among them, which I think she recognizes by its smell and cry.

Mr. Morgan's testimony is very explicit and is based upon long experience and continued observation.

Samuel Falconer, at one time deputy collector of customs, and whose testimony has been quoted on other points, gives the results of his actual observations. He says (*ibid.*, p. 164):

The place of birth is on the breeding grounds, which takes place after the female lands, generally within two days. When first born

the pup can not swim, and does not learn so to do until it is six or eight weeks of age. It is therefore utterly impossible for a pup to be born in the water and live. I have noticed that when a pup of this age is put in the water it seemed to have no idea of the use of its flippers, and was very much terrified. A pup is certainly for the first six or eight weeks of its life a land animal, and is in no sense amphibious. During this period also a pup moves very much like a young kitten, using its hind flippers as feet. A mother seal will at once recognize her pup by its cry, hobbling over a thousand bleating pups to reach her own, and every other approaching her, save this one little animal, she will drive away. * * * A pup, however, seems not to distinguish its mother from the other females about it.

William Healey Dall, a scientist whose studies were completed under Prof. Louis Agassiz, at Cambridge, in the year 1863, and who has been since that time engaged in scientific work, gave the result of his personal examination made during the several years that he visited St. George Island and the Aleutian Islands. His opportunities to familiarize himself with aquatic seal life were excellent and are fully detailed in his deposition on pages 23 and 24 of the Appendix to the Case of the United States. He says:

From my knowledge of natural history and from my observations of seal life, I am of the opinion that it would be impossible for the young seals to be brought forth and kept alive in the water. When it is the habit of an animal to give birth to its young upon the land, it is contrary to biologic teaching and common sense to suppose they could successfully bring them forth in the water. It does not seem to me at all likely that a mother would suckle any pup other than her own, for I have repeatedly seen a female select one pup from a large group and pay no attention to the solicitations of others. Pups require the nourishment from their mothers for at least three or four months after their birth, and would perish if deprived of the same.

I have had ample opportunity to form an opinion in regard to the effect upon the herd of killing female seals. The female brings forth a single offspring annually, and hence the repair of the loss by death is not rapid. It is evident that the injury to the herd from the killing of a single female, that is, the producer, is far greater than from the death of the male, as the seal is polygamous in habit. The danger of the herd, therefore, is just in proportion to the destruction of female life. Killing in the open waters is peculiarly destructive to this animal. No discrimination of sex in the water is possible, the securing of the prey when killed is under the best of circumstances uncertain, and as the period of gestation is at least eleven months and of nursing three or four months, the death of the female at any time means the destruction of two, herself and the fetus; or when nursing, three—herself, the nursing pup, and the fetus. All killing of females is a menace to the herd, and as soon as such killing reaches the point—as it inevitably must if permitted to continue—where the annual increase will not make good the yearly loss, then the destruction of the herd will be equally rapid and certain, regarded from a commercial standpoint, though a few individuals might survive.

Karp Buterin, a native of St. Paul Island, on which island he had lived up to the time of making his deposition, when he was 39 years of

age, had been engaged in driving seals, clubbing and skinning them ever since he was able to work; he says (Appendix to Case of the United States, Vol. II, p. 103):

Schooners kill cows, pups die, and seals are gone. Some men tell me last year, "Karp, seals are sick." I know seals are not sick; I never seen a sick seal, and I eat seal meat every day of my life. * * * No big seals die unless we club them; only pups die when starved, after the cows are shot at sea. When we used to kill pups for food in November they were always full of milk; the pups that die on the rookeries have no milk. The cows go into the sea to feed after the pups are born, and the schooner men shoot them all the time.

The same rule as to exclusive nursing of her own pups by the cow is proven to exist in the Antarctic regions by Mr. Comer.

George Comer (*ibid.*, p. 598) says:

I have never seen a "clap-match" suckling more than one pup, and it is my impression that a "clap-match" would not nurse any pup except her own, for I have seen her throw other pups aside and pick out one particular one from the whole number on the rookery.

Anton Melovedoff, a native of Alaska, testifies as follows (*ibid.*, p. 144):

When the pup is born it is utterly helpless and would drown if put into water. Those born nearest the water are often drowned in the surf when the sea is rough in stormy weather. When the pup is a few days old the cow goes into the sea to feed and as the pup grows older the cow will stay longer and longer until sometimes she will be away for a week. When the cows return they go to their own pups, nor will a cow suckle any pup but her own. The pups would suck any cow that would let them, for they do not seem to know one cow from another.

H. H. McIntyre, to whose valuable deposition attention has been heretofore called, uses this language (*ibid.*, p. 41):

At this time they are simply land animals, with less aquatic instinct and less ability to sustain themselves in water than newly hatched ducklings. When the pups are a few days old the mothers leave them (generally soon after coition upon the rookeries with the old male) to go to the feeding grounds, returning at intervals of one to three or four days to suckle their young. The pups do not appear to recognize their own dams, but the mother distinguishes her own offspring with unerring accuracy and allows no other to draw her milk.

Louis Kimmel, at one time assistant Treasury agent on St. George Island and a resident of that place for over one year, testifies as follows (*ibid.*, p. 174):

A cow never suckles any but her own pup. When a strange pup approaches a cow she will drive it away from her, and out of thousands of pups huddled together she will single her own. It is my opinion that if a mother is killed off her offspring dies of starvation.

To the same effect is the testimony of Dr. Hereford. William S. Hereford, a physician of character and experience, a graduate of Santa Clara College, S. J., and of the University of Pennsylvania (*ibid.*, p. 33):

It is a well-known fact that the female seals leave the islands and go great distances for food, and it is clearly proven that many of them do not return, as the number of pups starved to death on the rookeries demonstrates.

The old mother seal will not nurse any but its own offspring and can single it out of a band of thousand, even after an absence of days from the islands. The difference between a well-nourished pup and one starving to death is also easily recognized, one being plump and lively, growing extremely rapidly, the other slowly dwindling away, its body becoming lean, long, and lanky, the head being the largest and most conspicuous part. The poor little thing finally drops from sheer exhaustion in its tracks, it being only a matter of time before it succumbs to starvation.

Dr. Hereford narrates in a highly interesting manner the efforts made to raise "Little Jimmie," a child of adverse circumstances, whose mother had been accidentally killed. This narrative may be found on pages 33 and 34 of the Appendix to the Case of the United States.

Several other witnesses concur in testifying that the mother will readily distinguish her own offspring from that of others and will not permit the young of any other seal to suckle her. If there is anything in the Report of the Commissioners of Great Britain which rises to the dignity of evidence and which may be weighed against this overwhelming mass of testimony, we have failed to discover it. The plausible suggestion that they make in explanation of the apparent effort of the mother to distinguish her offspring by smelling the various pups, is that she thus goes about until she finds one that does not smell of fresh milk (Sec. 323).

VII.—DEATH OF THE COW CAUSES THE DEATH OF THE PUP.

The materiality of the question last discussed, and of the fact asserted and demonstrated that the mother nurses only her own pup, lies chiefly in the correlative assertion that the death of the cow causes the death of the pup.

Assuming the premises to be established that the pup depends upon its mother for food and can be fed in no other way than by that mother, the conclusion establishes itself without the necessity of extrinsic proof. The testimony directly upon this point is voluminous, and, it is submitted, entirely satisfactory. It goes very far to explain one of the general causes for the diminution of the species.

So many witnesses have testified upon this point, and it is so doubtful whether any testimony at all is needed if it be established that the pup depends wholly upon its mother, that we shall confine ourselves to brief abstracts.

George Ball (Appendix to Case of the United States, Vol. II, p. 481), a shipmaster and a sealer, does not hesitate to say that the pups perish with the cows that he and his companions kill.

William Brennan sums up the situation with the conclusive argument that "it stands to reason that if the mothers are killed while away from the island and the pups are left there alone they will surely die, and it is a fact that many mothers are killed in Bering Sea" (*ibid.*, p. 363).

Henry Brown, seaman, engaged in pelagic sealing and residing at Victoria, British Columbia, gives his experience in the slaughter of gravid females as well as the females taken in the Bering Sea which are not gravid, he says: These were cows in milk. Every seal captured causes the death of either an unborn pup or the death of a young pup by starvation on the islands. He says (*ibid.*, p. 318):

If pelagic sealing is continued, especially with guns, in a few years the seal herd will become commercially destroyed.

Luther T. Franklin, a seal-catcher, being asked, "Do the pups perish with the cows that you kill?" answered, "naturally they must." (Appendix to Case of the United States, Vol. II, p. 426.)

Charles Lutjens testifies, with probably unconscious force, as to the brutality of the occupation in which he is engaged (*ibid.*, p. 459):

Q. Do the pups perish with the cows that you kill?—A. Certainly. Not alone that, but they generally leave, while they go into the Bering Sea, a pup on shore, which also dies from not being able to get any sustenance. The seal which is killed in the Bering Sea may be with pup and also has a pup on shore, which made the killing three seals to one.

Alexander McLean says that if you kill a female seal you kill the pup with her (*ibid.*, p. 437).

For other testimony upon this point, see Daniel Claussen (*ibid.*, p. 412), Luther T. Franklin (*ibid.*, p. 425), Louis Kimel (*ibid.*, p. 174), and many others testifying to the same fact.

Multiplication of extracts could not add to the force of testimony so reasonable and conclusive upon its face.

Indeed, the evidence is so complete that the victims of pelagic

slaughter are mainly, if not wholly, females, as to forbid contradiction. We accordingly find that the British Commissioners make this admission: "It is *undoubtedly true* that a *considerable proportion* of the seals taken at sea are females, *as all seals of killable size are killed without discrimination of sex*" (Sec. 78). It is true that they hasten to add that this disproportion is due *in part* to the persistent killing of young males on land. Possibly this may be true. Undoubtedly if the poachers found killable males as well as gravid females, they would slaughter both and the disproportion would be less marked. But the Commissioners do not pretend that the *absolute number* of females killed would be any smaller. The pelagic hunter would kill them all with indiscriminate impartiality. How the situation would be helped by this is not stated, although it may show how the scope of the business might be enlarged. This curiosity is stimulated, but not satisfied, by the admission that their disproportion is *in part* explained as stated; it might have been just to the Tribunal to state what else might be said to throw light upon the subject.

The cows, while suckling, go to sea for food and sometimes to distances as great as 100 to 200 miles, and are during such excursions exposed to capture by pelagic sealers (see Case of the United States, p. 115). The statement in the Case to this effect is borne out by the testimony and by fully substantiated facts.

The vagueness of the statement made by the British Commissioners fails to conceal the evident intent to create the impression that the females, like the males, may live and nurse their young for a long time without food. In section 307 of their Report this language is used:

It is very generally assumed that the female, on thus beginning to leave the rookery ground, at once resumes her habit of engaging in the active quest for food, and though this would appear to be only natural, particularly in view of the extra drain produced by the demands of the young, it must be remembered that, with scarcely any exception, the stomachs of even the bachelor seals killed upon the islands are found void of food, and that all seals resorting to the islands seem, in a great degree, to share in a common abstinence.

The concession of an *extra drain* upon a nursing female is generously followed up by the statement "that it may be considered certain that after a certain period the females begin to seek such food as can be obtained." It is then stated that "there is a very general belief among the natives, both of the Pribilof and Commander islands, to the effect that the females do not leave the land to feed while engaged in suckling

their young." That there is any such general belief is most strenuously denied on the part of the United States, is disproven by the few witnesses cited by the British Commissioners themselves, and is negatived overwhelmingly by the testimony on the part of the United States.

The painful attempt to justify pelagic sealing by distortion of commonly accepted facts is nowhere more apparent than in section 308:

It appears to us to be quite *probable*, however, that toward the close of the season of suckling, the female seals may actually begin to spend a considerable portion of their time at sea in search of food. It is unlikely that this occurs to any notable extent until after the middle of September, *before which the season of pelagic sealing in Bering Sea practically closes.*

Comment would be absurd on this.

"Bryant", say the British Commissioners, "after describing the relaxation in watchfulness of the male after impregnation has been accomplished, says of the female: 'From that time she lies either sleeping near her young or spends her time floating or playing in the water near the shore, returning occasionally to suckle her pup.'"

That she should go to the water to play and float and neglect the opportunities of replenishing her energies, wasted as they are by nursing, seems utterly incredible. It is well to note the admission, however, that during this period the suckling is on land whither she returns to accomplish it.

Elliott is quoted in the same section as stating that "the mother nurses her pup every two or three days," but adds, "in this I am very likely mistaken." Again, Elliott says of the mother, coming up from the sea, that "she has been there to wash and perhaps to feed for the last day or two." In another reference given by the British Commissioners from the same authority, he is made to say:

Soon after the birth of their young, they leave it on the ground and go to the sea for food, returning perhaps to-morrow, perhaps later, even not for several days, in fact, to again suckle and nourish it, *having in the meantime sped far off to distant feeding banks.* (Sec. 309.)

It will be observed that this agrees entirely with the testimony produced by the United States. The report then goes on to cite authorities showing how far the cows go out for food. Taylor is quoted as saying that they go out every day a distance of 10 or 15 miles, or even farther.

T. F. Ryan says that the main feeding grounds of the seal during the summer stay upon the islands, and to which the cows are continually going and coming, are to be found 40 to 70 miles south of St. George Island.

G. R. Tingle, in the same report cited, says the seals probably go 20 miles out, in some cases, in search of food.

The British Commissioners, in this exceptional instance, are to be credited not only with having been diligent, but with disclosing the names of the persons from whom information was obtained. It might have been desirable that these statements should be made in the language of the persons themselves. However, we quote it as it is given us.

Tingle, in section 312, extends the feeding area from 20 miles, which he has named above, *to 30 or even 40 miles* from the land. Redpath did not know of the feeding grounds, but believed that the females go from 10 to 15 miles from the islands for the purpose of feeding. Daniel Webster (whom they graciously indorse as a truthful witness) concurred with Ryan, and expressed the opinion that when feeding in the autumn *the seals went 60 miles to the southward of St. George Island*. He believed that there was a *favorite feeding ground in that vicinity*, and stated the reasons of this belief. Mr. Webster is a reliable and intelligent witness, who has frequently been quoted by the American Commissioners. While he does not state the distance as being more than 60 miles, he certainly places it, with other reliable witnesses, sufficiently far out to sea to enable the poachers to destroy this class of seals. It may not be material whether the distance be 60 or 100 miles; when the men bent upon slaughtering seals, irrespective of condition and sex, have discovered the feeding grounds of the mothers, all that they will ask is that the distance be sufficiently great to secure to them immunity in their destructive work.

Mr. Fowler stated to the Commissioners (Sec. 312) that he believed that there was a favorite feeding ground of the seal about 30 miles off the northeast point of St. Pauls Island. This was not from personal knowledge, but dependent upon statements that seals had been seen in abundance there. That the seals caught on the feeding grounds must be females is the conclusive inference from the statements and argument of the British Commissioners themselves. They state that all seals resorting to the islands seem in a great degree to share in a common abstinence, and assert that the stomachs of even the bachelor seals killed upon the islands are found void of food. As all the authorities cited by them confine themselves to the females, it is worse than idle to argue that those which resort to the feeding grounds are either old males or young ones.

The statement is attributed to natives of St. Paul that the females from the rookeries went only 3 or 4 miles to sea and always returned to their young on shore the same day (Sec. 312). A statement so vague as to names and qualifications hardly deserves notice. It may be important, however, as showing that the natives have observed that females do return to their young for the purpose of nursing them.

Mr. Grebuitsky did not agree with most of the natives, who thought "that the females did not feed during this period," but stated as the result of his own personal observation and long experience that they went out to sea while suckling the young, but not further than half a mile or a mile from the shore. If food is to be procured so near the land by the mother, it may be that when she was seen floating or playing in the water near the shore by Mr. Bryant, and then returning occasionally to suckle her pup, she had also been employed upon the more profitable mission of securing milk-producing material.

Snegiloff thought that the females leave their young for several days to go as far as 10 miles from land to feed, while Kluge, the agent of the Russian Government in charge of the Copper Islands, thought that the females went as far as 2, 3, or 4 miles, but returned to the rookery every night.

To this undigested mass of information, thus unsatisfactorily reported, the magnanimous admission is added that "it is certain from statements obtained that females with milk are *occasionally killed at sea by the pelagic sealers*" (Sec. 314).

We may conclude from all this testimony on the part of the British Commissioners that the seals which leave the rookeries are almost exclusively, if not wholly, female seals, nursing their young and seeking food, and that they proceed to great distances in some cases, and are found in feeding grounds which may be from 40 to 60 miles distant from the land. It now remains to be seen what testimony is offered on the part of the United States to satisfy the judgment and conscience of the court which is to determine this, one of the most important elements in the controversy.

Assuming all the parties, who have given the information to the Commissioners of Great Britain and to the United States, for the respective countries to testify fairly and honestly, it is elementary that, where positive evidence of a fact is presented and negative evidence on the other side, the positive evidence shall be credited; otherwise the effect would be to stamp one party with perjury because what he is

stated to have seen or said or heard or done was unnoticed or unobserved by the witness testifying in the negative. If, therefore, the sworn testimony of reputable persons is produced extending the area in which the female seals have been observed in quest of food, preference must be given to them rather than to those witnesses whose opportunities may not have been the same or whose powers of observation may not have been equal. Where witnesses *testify positively that they have seen and killed seals over 100 miles from land*, can they be truly said to be contradicted as to the fact by men who say that they have never seen them more than 60 miles from the shore?

Peter Anderson (Appendix to Case of the United States, Vol. II, p. 312), a seal-hunter, agrees with Mr. Webster, who is quoted by the British Commissioners. He says:

A large majority of the seal taken on the coast and in Bering Sea are cows with pup in the Pacific Ocean and with milk in Bering Sea. A few young male seal are taken in the North Pacific Ocean, from two to three years old. Have never taken an old bull in the North Pacific Ocean in my life. A few yearlings have been taken by me, but not many. Used no discrimination, but killed all seals that come near the boats. The best way to shoot seal to secure them is to shoot them in the back of the head when they are asleep with their noses under water. Have never known any seal pups to be born in the water nor anywhere else in Alaska outside of the Pribilof Islands, nor have I ever known fur-seal to haul up anywhere on the land except on the Pribilof Islands. Have taken females that were full of milk 60 miles from the Pribilof Islands.

John Armstrong (Appendix to Case of the United States, Vol. II, p. 1), who had been during many years agent of the Alaska Commercial Company and lived for the whole of ten years upon St. Paul Island, observed that very few seals go out to sea to feed during June, July, and August, except females and some of the younger seals. He adds:

I am asked whether the seals copulate in the water. It is a question that is often discussed at the island, and neither the scientific observers nor the unscientific are able to agree about it. I have seen seals in position when it seemed to be attempted, but doubt whether it is effectually accomplished. If it were, I think we should see pups sometimes born late and out of season, but such is not the case.

Kerrick Artomanoff (*ibid.*, p. 99) worked on the sealing grounds for the last fifty years. His deposition is well worth reading. It may be found at page 99. He accounts for the decrease in the number of seals since 1874 by the destruction of the females. He states that in 1887 and 1891 the rookeries were covered with dead pups. In his sixty-seven years' residence on the island he never saw anything like it before. No sickness was ever known among the pups or seals,

and he had never seen any dead pups on the rookeries, except the few killed by the old bulls when fighting or by drowning when the surf washed them off (*ibid.*, p. 100). He states that four or five days after the birth of the pup the mother seal leaves her offspring and goes away in the sea to feed, and when the pup is two or three weeks old the mother often stays away five or six days at a time.

William C. Bennett (*ibid.*, p. 356) had been a seal-hunter all his life; he was 32 years old at the time of deposing. He had hunted the seal with spear and sometimes with a shotgun. Most of the seals taken by him were cows. He thought that the cows slept more and are more easily approached. The sex of the seal not being ascertainable in the water, he shot everything that came near his boat, and when the seal is shot dead it sinks very quick and is hard to secure under those conditions. He also agreed with the other witnesses that seals were decreasing in number very fast, and he attributed this to the indiscriminate killing in the water.

Joseph Stanley-Brown, a geologist, whose testimony on other points has heretofore been given attention, says:

For the first few days, and possibly for a week or even ten days, the female is able to nourish her young or offspring, but she is soon compelled to seek the sea for food, that her voracious young feeder may be properly nourished, and this seems to be permitted on the part of the male though under protestation. The whole physical economy of the seal seems to be arranged for alternate feasting and fasting, and it is probable that in the early days of its life the young seal might be amply nourished by such milk as the mother might herself afford without resorting herself to the sea for food.

John C. Cantwell (*ibid.*, p. 408), second lieutenant in the United States Revenue Marine, had been on duty in Behring Sea during the years 1884, 1885, 1886, and 1891. He had paid particular attention to the seals and whenever opportunity offered had visited the rookeries for the purpose of photographing and sketching the animal, etc. He had boarded a large number of vessels fitted out as sealers and engaged in sealing, and had conversed with the masters and crews on the subject of pelagic sealing. This is his testimony:

From information gathered from these and other sources, and by comparison of testimony given by the seal hunters, would say that at least 60 per cent of seals killed or wounded escape and are never recovered, and that 75 per cent of seals shot in the North Pacific Ocean are females heavy with young, and that 80 per cent. of seals shot in Behring Sea from July 1 to September 15 are females, most of which have given birth to their young, and are mostly caught while feeding at various distances from land.

Capt. Carthcut (*ibid.*, p. 404), a master mariner, engaged in hunting the fur-seals for 10 years, extending from 1877 to 1887, during the latter part of the time in Bering Sea, speaks on his personal knowledge, and makes a valuable contribution to the knowledge which we have upon the subject. One of the reasons which he assigns for the great slaughter of female seals is that maturity makes them tame and easily approachable. He says:

About 80 per cent of the seals I caught in the Behring Sea were mothers in milk, and were feeding around the fishing banks just north of the Aleutian Islands, and I got most of my seals from 50 to 250 miles from the seal islands. I don't think I ever sealed within 25 miles of the Pribilof Islands. They are very tame after giving birth to their young, and are easily approached by the hunters. When the females leave the islands to feed, they go very fast to the fishing banks, and after they get their food they will go asleep on the waters. That is the hunter's great chance. I think we secured more in proportion to the number killed than we did in the North Pacific. I hunted with shotgun and rifle, but mostly with shotgun. Seals were not nearly as numerous in 1887 as they were in 1877, and it is my belief that the decrease in numbers is due to the hunting and killing of female seals in the water. I do not think it possible for seals to exist for any length of time if the present slaughter continues. The killing of the female means death to her born or unborn pup, and it is not reasonable to expect that this immense drain on the herds can be continued without a very rapid decrease in their numbers, and which practically means extermination within a very few years.

Christ Clausen (*ibid.*, p. 319), a master mariner, was engaged in seal hunting as mate of the British schooner *C. H. Tupper*, in 1889. He resides at Victoria, British Columbia, and also was navigator in the British schooner *Minnie*. His testimony is worth reproducing somewhat extensively. Unless willful perjury be attributed to him, his testimony, based on actual observation and experience in the business of slaughtering seals, should be accepted as conclusive on several of the points under consideration:

The Indian hunters, when they use spears, saved nearly every one they struck. It is my observation and experience that an Indian, or a white hunter, unless very expert, will kill and destroy many times more than he will save if he uses firearms. It is our object to take them when asleep on the water, and any attempt to capture a breaching seal generally ends in failure. The seals we catch along the coast are nearly all pregnant females. It is seldom we capture an old bull, and what males we get are usually young ones. I have frequently seen cow seals cut open and the unborn pups cut out of them and they would live for several days. This is a frequent occurrence. It is my experience that fully 85 per cent of the seals I took in Behring Sea were females and had given birth to their pups and their teats would

be full of milk. I have caught seals of this kind 100 to 150 miles from Pribilof Islands. It is my opinion that spears should be used in hunting seals, and if they are to be kept from extermination the shotgun should be discarded.

Peter Collins, also engaged in sealing as a sailor, testified as to the manner of shooting the seals (*ibid.*, p. 413. Fully three-fourths of the seals shot in the North Pacific, he says, were females with young. He swears that he has seen mothers with their breasts full of milk killed 100 miles or more from the seal islands. He knows that they go great distances for food. His testimony is that of a practical man who evidently entertained no prejudice on the subject of killing the mothers with breasts full of milk. He was apprehensive, however, that his business would be destroyed. He says:

There were not nearly as many seals to be found in 1889 as there were in 1888. I think the decrease was caused by the great destruction of females killed in the sea by the hunters, and if something is not done to protect them from slaughter in the North Pacific and Behring Sea, they will all be gone in a few years.

Capt. Coulson (*ibid.*, pp. 414-416), of the United States Revenue Marine, makes a very interesting deposition. His experience was practical and extensive. He says:

In company with Special Agent Murray, Capt. Hooper, and Engineer Brerton, of the *Corwin*, I visited the reef and Gobatch rookeries, St. Paul Island, in August, 1891, and saw one of the most pitiable sights that I have ever witnessed. Thousands of dead and dying pups were scattered over the rookeries, while the shores were lined with emaciated, hungry little fellows, with their eyes turned toward the sea, uttering plaintive cries for their mothers, which were destined never to return. Numbers of them were opened, their stomachs examined, and the fact revealed that starvation was the cause of death, no organic disease being apparent.

The great number of seals taken by hunters in 1891 was to the westward and northwestward of St. Paul Island, and the largest number of dead found that year in rookeries situated on the west side of the island. This fact alone goes a great way, in my opinion, to confirm the theory that the loss of the mothers was the cause of mortality among the young.

After the mother seals have given birth to their young on the islands, they go to the water to feed and bathe, and *I have observed them*, not only around the island *but from 80 to 100 miles out at sea*.

In different years the feeding grounds or the location where the greater number of seals are taken by poachers seem to differ; in other words, the seals frequently change feeding grounds. For instance, in 1887, the greatest number of seals were taken by poachers between Unamak, Akatan Passes and the seal islands, and to the southwestward of St. George Island. In 1889, the catching was largely done to the southward and eastward, in many cases from 50 to 150 miles distant from the seal islands. In the season of 1890, to the southward

and westward, also to northwest and northeast of the islands, showing that the seals have been scattered. The season of 1891, the greatest number were taken to northward and westward of St. Paul, and at various distances from 25 to 150 miles away.

The testimony of such a witness, speaking of his knowledge, declaring *upon his oath* that he had *seen* females feeding 80 to 100 miles from the Pribilof Islands, ought to outweigh the negative and loose statements of any conceivable number of natives or other informants upon whom the British Commissioners have relied.

Charles Challall (*ibid.*, p. 410), a sealer who had been sealing up the coast and in Bering Sea three seasons, testified as follows:

Most of the seals we killed up the coast were females heavy with pup. I think nine out of every ten were females. At least seven out of every eight seals caught in the Bering Sea were mothers in milk. The vessels I went out in had from four to six boats each. Each boat had three men, a hunter and two pullers. The average hunter would get one out of every three that he shot; a poor hunter not nearly so many. There are twenty-one buckshots to a shell. I think a great many seals are wounded by hunters that are not taken. The gunshot wounds more seals than the rifle. I think the aim of the hunter is to kill the seal rather than to wound it. When they are in schools sleeping we get a good many. We did not get as many we shot at in the Bering Sea as we did on the coast. If we got one out of every three that we wounded in the Bering Sea we were doing pretty well. I do not know of any place where the seals haul up on this coast except on the seal islands.

Mr. W. H. Dall (upon whose manuscript note, said to have been supplied to Prof. Allen, the British Commissioners rely to show coition in the water). He testifies to having seen seals in the water of Bering Sea 100 miles or more from the Islands. His testimony, too, seems conclusive, if he is a reliable witness. This is his language:

The Pribilof Islands are the chosen home of the fur-seal (*Callorhinus ursinus*). Upon these islands they are born; there they first learn to swim, and more than half their life is spent upon them and in the water adjacent thereto. *Here they give birth to their young, breed, nurse their pups, and go to and from their feeding grounds, which may be miles distant from the islands. I have seen seals in the waters of Bering Sea distant 100 miles or more from the islands at various times between the 1st of July and October. These seals were doubtless in search of food, which consists, according to my observation, of fish, squid, crustaceans, and even mollusks. Upon the approach of winter the seals leave their homes, influenced doubtless by the severity of the climate and decrease in the food supply (Appendix to Case of the United States, Vol. II, p. 23).*

James Henry Douglas (*ibid.*, p. 419), was by occupation a master and pilot of vessels, and had had long experience sailing in the North

Pacific and Bering Sea; had gone to the seal islands in the latter sea over twenty years ago, and been there many times subsequently while in the employ of the Government. He testifies that his observation and information agreed with that of many other witnesses. He says:

My information and observation is that a very large proportion of those killed along the coast and at sea from Oregon to the Aleutian Islands are female seals with pups; I think not less than 95 per cent. The proportion of female seals killed in the Bering Sea is equally large, but the destruction to seal life is much greater owing to the fact that when a mother seal is killed her suckling pup left at the rookery also perishes. Impregnation having also taken place before she left the rookery in search of food, the fetus of the next year's birth is likewise destroyed. I also found that *females after giving birth to their young at the rookeries seek the codfish banks at various points at a distance of from 10 to 125 miles from the islands for food*, and are frequently absent one or more days at a time, when they return to find their young.

I have noticed that the females when at sea are less wild and distrustful than the bachelor seals, and dive less quickly in the presence of the hunter. After feeding plentifully or when resting after heavy weather they appear to fall asleep upon the surface of the water. It is then they become an easy target for the hunters.

George Dishow, of Victoria, British Columbia, was by occupation a seal hunter and pursued that business six years (*ibid.*, p. 323).

I use a shotgun exclusively for taking seal. Old hunters lose but very few seals, but beginners lose a great many. I use the Parker shotgun. A large proportion of all seals taken are females with pup. A very few yearlings are taken. I never examined them as to sex. But very few old bulls are taken, but five being taken out of a total of 900 seals taken by my schooner. Use no discrimination in killing seal, but shoot everything that comes near the boat in the shape of a seal. Hunters shoot seal in the most exposed part of the body. Have never known any pups to be born in the water, nor on the land on the coast of Alaska anywhere outside of the Pribilof Islands. Have never known fur-seal to haul up on the land anywhere on the coast except on the Pribilof Islands. Most of the seals taken in Bering Sea are females. Have taken them 70 miles from the islands that were full of milk. I think a closed season should be established for breeding seal from January 1st to August 15th in the North Pacific Ocean and Bering Sea.

George Fairchild (*ibid.*, p. 423), made a sealing voyage to the North Pacific Sea as sailor on the *Sadie Clyde*, sailing from Victoria on the 10th of April, 1888. They went north to the Bering Sea, sealing all the way up, and got 110 seals before entering the sea:

"Most of them," he says, "were cows, nearly all of which had pups in them. We took some of the pups alive out of the bodies of the females. We entered the Bering Sea May 25, and we got 704 seals in there, the greater quantity of which were females with their breasts full of milk, a fact which I know by reason of having seen the milk flow on the deck when

they were being skinned. We had 5 boats on board, each boat having a hunter, boat puller, and steerer. We used shotguns and rifles. We got one out of every 5 or 6 that we killed or wounded. We wounded a great many that we did not get. We caught them from 10 to 50 miles off the seal islands."

This is the *sportsmanlike method* of hunting seals of which the British Commissioners speak in terms of undisguised admiration!

Samuel Falconer (*ibid.*, p. 165), deputy collector of customs in 1868 and 1869, then purser on board the steamer *Constantine*, was also in charge of St. Paul Island several years. It was a part of his duty to make a very careful and full study of seal life. It was his opinion that if a pup lost its mother by any accident it would certainly die by starvation. When the young seal are 6 or 8 weeks of age their mothers force them into the water and teach them to swim. After repeated trials the pup learns to swim, and from that time on spends a great deal of time in the water, but still the greater portion of these first months of its life are spent on land sleeping and nursing.

The cow, after bringing forth her young, remains on the rookery until again fertilized by the bull, which is, I believe, within two weeks. After the fertilization she is allowed to go to and from the water at will in search of food, which she must obtain so she can nurse her pup. She goes on these feeding excursions sometimes, I believe, 40 or more miles from the islands, and as she swims with great rapidity, covers the distance in a short time. She may go much farther, for I have known a cow to be absent from her pup for two days, leaving it without nourishment for this period. This shows how tenacious of life a young seal is, and how long it can live without sustenance of any sort. The 3-year-old male has meanwhile landed on the hauling ground and is now of the most available age to kill for his pelt.

John Fratis (*ibid.*, p. 108) was of opinion that the cows were killed by the hunters when they go out in the sea to feed, and the pups are left to die and do die on the islands. He says:

The pups are born soon after the arrival of the cows, and they are helpless and can not swim, and they would drown if put into the water. The pups have no sustenance except what the cows furnish, and no cow suckles any pup but her own. The pups would suck any cow if the cow would let them.

After the pup is a few days old the cow goes into the sea to feed, and at first she will only stay away for a few hours, but as the pup grows stronger she will stay away more and more until she will sometimes be away for a week.

William Frazer gives his experience as a sealer. The hunters use shotguns, he says (*ibid.*, p. 427), and got about one out of every six they shot at or killed, and sometimes they got none. The great majority of

them were females. Most of the females killed have unborn pups or were cows in the milk. They did not kill any on the Island because they never went in close enough. He testifies positively that "we," meaning his companions and himself on the *Charles Wilson*, "killed females giving milk more than 100 miles from the seal islands. Most of the seals sunk or dove out of sight when killed or wounded, and a great many of them we could not get." On one occasion he got 600 seals. He does not know whether it was on the American side or not. They were almost all females. He noticed when he skinned them that they were females in milk, as the milk would run from their breasts on to the decks. He concurs with the other witnesses as to the diminution in the number of seals.

Norman Hodgson (*ibid.*, p. 366) *observed nursing cows from 60 to 80 miles from the Pribilof Islands*, where they were ranging to feed.

I do not think it possible for fur-seals to breed or copulate in water at sea and never saw nor heard of the action taking place on a patch of floating kelp. I have never seen a young fur-seal pup of the same season's birth in the water at sea nor on a patch of floating kelp and in fact never knew of their being born anywhere save on a rookery. *I have, however, cut open a gravid cow and taken the young one from its mother's womb, alive and crying.* I do not believe it possible for a fur-seal to be successfully raised unless born and nursed on a rookery. I have seen fur-seals resting on patches of floating kelp at sea, but do not believe they ever haul up for breeding purposes anywhere except on rookeries.

Chad George (*ibid.*, p. 365) 27 year old and a seal hunter since he was a mere boy, has been engaged in the killing of seals and speared everything that came near his boat, regardless of sex. *He had killed seals 200 miles from the Pribilof Islands that were full of milk.*

H. A. Gliddon (*ibid.*, p. 210), stated that the females during the entire sealing season are going and coming to and from the water for the purpose of feeding, and in his opinion while the females are thus going to and from the feeding ground and through the Aleutian passes they are intercepted and shot by open-sea sealers.

Capt. E. M. Greenleaf, a resident of Victoria, British Columbia, a sea faring man, holding a commission as master mariner, captured *at one time sixty-three seals, all of which were females and all were pregnant* (*ibid.*, p. 324). He was informed by conversation with Bering Sea seal hunters that they killed seal cows 20 to 200 miles from the breeding grounds, and that these cows had evidently given birth at a recent time to young. As to the proportions of seals fired at and killed or wounded, it is his

judgment that, taking the run of hunters, good and bad, the *best get about 50 per cent of those shot at, and the poorest not more than one out of fifteen.*

Cumulative testimony to this effect might be cited to the extent of wearisome repetition, but if the learned Arbitrators should desire to pursue the subject as far as the evidence will permit, we give below references to the testimony to be found in the Appendix and not specially quoted.

We submit that it is absolutely conclusive unless, as we have suggested before, for some unknown reason it should be rejected as intentionally and criminally false.

Arthur Griffin (*ibid.*, p. 325) *captured females from 20 to 200 miles from the rookeries.*

James Griffin (*ibid.*, p. 433) *killed female seals full of milk 90 miles from the islands.*

Martin Hannon (*ibid.*, p. 445) *killed them full of milk 100 miles from the seal islands.*

James Harrison (*ibid.*, p. 326) *caught 200 seals in the Behring Sea about the 1st of June, mostly mothers.*

James Hayward (*ibid.*, p. 327) *caught them 150 miles from the shore and skinned them when their breasts were full of milk. He says that they travel very fast and go a long way to feed.*

J. Johnson (*ibid.*, p. 331) *killed female seals full of milk 75 miles from the island; used a shotgun and killed everything.*

Louis Kimmel (*ibid.*, p. 173) *had observed them at least 20 miles from the islands.*

Andrew Laing (*ibid.*, p. 334) *had caught them 75 to 100 miles from the island and in skinning them the milk would run out of the teats of the females, they having given birth recently to young on the islands.*

William H. Long (*ibid.*, p. 457) *killed mothers in milk all the way from 10 to 200 miles off shore.*

Thomas Lowe (*ibid.*, p. 371) *in 1889 hunted in the Bering Sea from 80 to 100 miles off the Pribilof Islands. Two-thirds of his catch were cows in milk.*

Thomas Lyons (*ibid.*, p. 460) *about the 26th or 28th of June went into the Bering Sea and caught 389 seals, nearly all of which were mothers in milk. He knows it as he saw the milk flow on the deck while skinning them.*

William M. McLaughlin (*ibid.*, p. 461) *killed them 50 to 60 miles off shore, most of them with milk.*

Alexander McLean (*ibid.*, p. 436) killed them as far off as *150 miles off the land*. They were *mothers with young*.

Daniel McLean (*ibid.*, p. 444) killed mothers all the way from 20 to 65 miles off St. George and St. Paul.

Robert H. McManus (*ibid.*, p. 335), a resident of Victoria; by profession a newspaper correspondent; went for his health on a sealing expedition. His deposition is exceptionally minute and interesting. The men on his ship (Schooner *Otto*) killed them at a distance of 200 miles from the rookeries. Over three-fourths of his catch were cows in milk. Judged from the number of shots fired that it took about one hundred to secure one seal; one day there was a total catch of seventeen seals; greater proportion were in milk; horrid sight; could not stay the ordeal out till all were flayed.

Thomas Madden (*ibid.*, p. 463) has spent or had been going to the Bering Sea over 12 years, which he entered about June. Most of the seals killed were cows and he saw the milk run out of their breasts on the deck as they were being skinned.

G. E. Miner (*ibid.*, p. 466) killed seals *with milk* 250 miles from the Pribilof Islands.

Thomas F. Morgan (*ibid.*, p. 60) says that the female goes *40 miles or even farther* from the island.

Niles Nelson (*ibid.*, p. 469) *swears that he has killed mothers in milk* 100 miles or more from the island.

Dr. Noyes (*ibid.*, p. 82), resident physician and sometimes schoolmaster on the islands, says that the female mother goes a distance of from *40 to 200 miles from the island to feed*. His deposition is very full and interesting. It is valuable as shedding light on most, if not all, of the questions here involved.

John Olsen (*ibid.*, p. 471) swears that *he shot twenty-eight himself from 50 to 150 miles off the seal islands*. *They were mothers full of milk*.

Other witnesses estimate the distance at 60 miles, 100 miles, etc. See T. F. Ryan (*ibid.*, p. 175), C. M. Scammon (*ibid.*, p. 473), Adolphus Sayres (*ibid.*, p. 473), L. G. Shepard (*ibid.*, p. 187), William H. Smith (*ibid.*, p. 478), Z. L. Tanner (*ibid.*, p. 374).

Capt. Tanner, lieutenant-commander in the United States Navy, makes a deposition which is entitled to particular consideration. The following is a short extract:

Seals killed in Bering Sea after the birth of pups are largely mother seals, *and the farther they are found from the islands the greater the per-*

centage will be. The reason for this seeming paradox is very simple. The young males, having no family responsibilities, can afford to hunt nearer home, where food can be found if sufficient time is devoted to the search. The mother does not leave her young except when necessity compels her to seek food for its sustenance. She can not afford to waste time on feeding grounds already occupied by younger and more active feeders; hence she makes the best of her way to richer fields farther away, gorges herself with food, then seeks rest and a quiet nap on the surface. Under these circumstances she sleeps soundly, and becomes an easy victim to the watchful hunter.

A double waste occurs when the mother seal is killed, as the pups will surely starve to death. A mother seal will give sustenance to no pup but her own. I saw sad evidences of this waste on St. Paul last season, where large numbers of pups were lying about the rookeries, where they had died of starvation.

Adolph W. Thompson (*ibid.*, p. 486) killed females in milk, *although he never went nearer to the island than 25 or 30 miles.*

Michael White (*ibid.*, p. 489) killed seals in milk *not less than 100 to 200 miles* from the island.

William H. Williams (*ibid.*, p. 93), United States Treasury agent in charge of the seal islands in Bering Sea, states that it is a well-known fact substantiated by the statements of reputable persons who have been on sealing vessels and seen them killed *200 miles or more from the islands, and who say that they have seen the decks of the vessels slippery of milk flowing from the carcasses of the dead females.* He alludes to the thousands of dead pups left on the rookeries starved to death by the destruction of their mothers as conclusive evidence of the destruction and havoc wrought by the pelagic seal hunters.

If this cumulative and unimpeachable evidence does not establish the fact which we have undertaken to prove, we must despair of satisfying this High Tribunal or any other tribunal of the correctness of our statements. We submit, however, that it is more than made out—that it must be taken as a fact in the discussion of this case—that the cows, while suckling, go to sea for food; that they travel long distances, sometimes as great as 200 miles; and that during such excursions they are ruthlessly slaughtered by pelagic sealers, in many cases without profit, as they sink and are irretrievably lost. The sickening details, abundantly furnished by the witnesses, sufficiently characterize the business, and justify the harshest expressions of condemnation. The slaughter thus described constitutes a crime, for it violates the most common instincts of our nature and would be punished by the laws of every civilized nation, if jurisdiction could only be acquired over the wrong doers. And yet the Commissioners for Great Britain undertake to justify this

practice for its sportsman-like qualities, and to eulogize it because it gives the seals a fair sporting chance for their life (Sec. 625). It is really, they say, *hunting as distinguished from slaughter (ibid)*. It is not easy to discuss these propositions with that patient and respectful consideration which is due to the importance of the questions involved.

VIII.—THE FUR-SEAL IS A POLYGAMOUS ANIMAL, AND THE MALE IS AT LEAST FOUR TIMES AS LARGE AS THE FEMALE. AS A RULE, EACH MALE SERVES ABOUT FIFTEEN OR TWENTY FEMALES, BUT IN SOME CASES AS MANY AS FIFTY OR MORE (CASE OF THE UNITED STATES, p. 327).

A great diminution in the number of females making up a harem has been noticeable in late years. Formerly there would be on an average 30 cows to a bull; now they will not average 15 (Case of the United States, p. 344). The British Commissioners are in substantial accord with the statements above quoted as to the service of the female by the male. They cite from Bryant to show that the proportion is 1 male to 9 to 12 females; from Elliott, that the mean number is 5 to 20, and from Mr. Grebnitzky, that the ratio should not exceed 1 to 20 (Sec. 54). This is sufficient for our present purposes, especially as they add that it is no *uncommon event*, during the last few years, to find a *single male seal with a harem numbering from 40 to 50, and even as many as 60 to 80, females* (Sec. 55). With their deductions from these facts we are not at this moment concerned. It is apparent, on the face of the report, that the Commissioners had a theory to support and that the facts were read by them in the light of that theory. An amusing illustration, among many, is found in the statements on this very point. Bearing in mind the severe criticism of earlier sections (54, 55, and 56) upon the system of sacrificing males so that the bulls are forced to supply the necessities of *40 to 60 and even 60 to 80 females*, read section 483, describing the condition of seal life as far back as 1842:

In the well-known Penny Cyclopaedia, published *so lately* as 1842 [half a century ago], the seal is described as follows: * * * "When these migratory seals appear off Kamtchatka and Kuriles early in the spring, they are in high condition and the females are pregnant. They remain on and about the shore for two months, during which the females bring forth. They are polygamous and live in families, *every male being surrounded by a crowd of females (from 50 to 80), whom he guards with the greatest jealousy.*" (Sec. 483.)

It would seem from this extract that the polygamous practices and habits of the seal have not changed since 1842 and that the service by

one male of a large number of females is *not* new and is *not* the result of excessive slaughter on the land.

We are not left, however, to the statements, inconsistencies, and citations of the British Commissioners' report. The testimony of many witnesses bears out the propositions stated in the Case of the United States and disposes at the same time of the pretense that the bulls are now compelled to perform increased and exhaustive duty by reason of a reduction in the number of young bulls.

The fact seems to be well established that the bull is possessed of extraordinary powers. He is able to subsist several months without tasting food and to fertilize at the same time an almost indefinite number of cows. The limitation in the number of his harem depends generally upon his ability to secure a larger or smaller proportion of females. He gathers about him as many cows as he can. Joseph Stanley-Brown speaks on this subject from actual observation. He describes the breeding bull as possessing "a vitality unsurpassed by any other member of the animal kingdom." He testifies that the very large harems were unfrequent and that the average number in the season immediately preceding was about 20 to 25. (Appendix to Case of the United States, Vol. II, p. 13). Charles Bryant places the average at 15 to 20 cows for each bull. (*Ibid.*, p. 6.) Samuel Falconer testifies to having seen 20 cows or more to a bull, but of course, he added, the exact number in a harem is a matter of conjecture, as many cows are absent in the water after the season has fairly commenced. (*Ibid.*, p. 166.) T. F. Morgan testifies that the bull returns to the island about the 1st of May and hauls up to the breeding rookeries, provided he is able to maintain himself there, which takes many bloody conflicts. *There he gathers about him as many females as he is able.* (*Ibid.*, p. 3.) Capt. Olsen is quoted by Theodore T. Williams as placing the number of females served by one bull at 20 or 25 (*ibid.*, p. 505.)

The respective weights of the animals is placed in the Case of the United States at 400 to 700 pounds; that of the cows at 100 (pp. 107, 113).

This great disparity in bulk should be borne in mind when we consider the probability of pelagic copulation.

The Encyclopedia Britannica states the weight of the animals substantially as it is stated in the testimony and case. The male seal is said to weigh 500 to 700 pounds, the females 80 to 100. There seems to be

no dispute as to these estimates (The Cyclopaedia also states that soon after the landing the female gives birth to one pup, weighing about 6 pounds).

The real conflict between the report of the British Commissioners and the Case of the United States seems to be as to the number of cows in a harem. The British Commissioners assert that the number is unduly large of cows served by one bull; the United States produce credible and experienced witnesses to show that, on the contrary, the number of females is decreasing. A comparison is invited between the two statements and the quality of proof adduced in favor of each. It is plain that the British Commissioners could not admit the diminution in number of female seals without admitting that decrease to be wholly due to pelagic slaughter. They are therefore reduced to the necessity of insisting that there is a redundancy of females and a deficit of males on the Islands. They are kind enough to admit, however, that "the sparing of females, *in a degree*, prevented, for the time being, the actual depletion of seals on the islands" (Sec. 58). It is not probable that any reasonable person will take issue with them on that point. The intelligence and legislation of the civilized world, not to speak of humanity in its broad sense, have concurred that to spare the female was, not the best, but the only effective method of preventing depletion and eventual extermination.

Even if we should concede, for the sake of the argument and in direct disregard of the fact, that the diminution is due to the smaller number of males, we would venture to remind this High Tribunal, if such a reminder were needed, that the pirates or poachers who pursue and slaughter the pregnant and nursing females are killing, by starvation in the one case, by the mother's death in the other, *a large number of males*. Even, according to their own showing, the British Commissioners must realize that *pelagic sealing is responsible*, to some extent at least, *for the decrease in the number of males, as well as of females*. They may speak of this "industry," as they term it, and glorify it as requiring all the courage and skill which can be brought to bear on it (whatever that may mean). (Sec. 609.) They may contrast its "sportsmanlike" character with the "butchery" committed on the islands (Sec. 610); but they can not fail to perceive that the mode of destruction which principally deals with gravid females, necessarily strikes at the very foundation of life and must eventually extinguish the race, because, as they mildly state it, it is *unduly destructive* (Sec. 633).

The pelagic sealer not only kills or attempts to kill the males that he happens to meet, but prevents the birth of males to take their place. He often kills three with one discharge of his rifle, viz.: the mother, the unborn young, and the pup at home; but he does it in a "sportsman-like" manner, and he gives the sleeping animal a "fair sporting chance for its life." (Sec. 610.) In many cases he either misses his object or wounds it and loses it. So that there is by this manly process an utterly useless waste of life, in many cases a waste more or less appalling as the "sportsman" is more or less skillful. How destructive in reality this process is proven to be may be seen from the British Commissioners' report under the head of "Proportion of Seals Lost," (p. 104, Sec. 603) It must be a consolation to those disposed to extol this kind of sport that while nearly "all the pelagic sealers concur in the opinion that the fur-seal is annually becoming more shy and wary at sea," it is certain that "*the dexterity of the hunters has increased pari passu with the wariness of the seals.*" (British Commissioners' Report, Sec. 401.)

That the number of the seals has been diminished in recent years and at a cumulative rate, and that such diminution is the consequence of destruction by man, is certified by the Joint Report of all the Commissioners. That this human agency is pelagic sealing exclusively, and not the mode, manner, or extent of capture upon the breeding islands, is abundantly clear.

This follows necessarily from admitted facts. The fur-seals being *polygamous*, and each male sufficient for from 30 to 50 females, and being able to secure to himself that number, it follows that there must be at all times a larger number of superfluous males, and the killing of these produces no permanent diminution of the number of the herd. On the other hand, the killing of a single breeding female necessarily reduces *pro tanto* the normal numbers.

An excessive killing of males might indeed tend toward a decrease if carried to such an extent as not to leave enough for the purpose of effectual impregnation of all the breeding females. The taking from these herds of 100,000 males would not, if that were the only draft allowed, be excessive. This is evident from many considerations.

(a) Those who, like the British Commissioners, propose to allow pelagic sealing to such an extent as would involve the annual slaughter of at least 50,000 females in addition to a slaughter of 50,000 young males on the breeding islands, can not certainly with the least consistency assert that the capture limited to 100,000 males would be excessive. Nor

could they consistently assert this even though the pelagic slaughter should be restricted (by some means which no one has yet suggested) to 10,000 females. It requires no argument to show that the destruction of even that number would be rapidly disastrous to the herds.

(b) And when we turn to the proofs, they are conclusive that prior to the practice upon any considerable scale of pelagic sealing, the annual draft of 100,000 young males did not tend to a diminution of numbers.

(c) Of course it is easily possible that the indiscriminate slaughter effected by pelagic sealing may soon so far reduce the birth rate as to make it difficult to obtain the annual draft of 100,000 young males. This draft, under such circumstances, would not necessarily at once diminish the birth rate, for, the number of females being less, a less number of males would be required. The number of the whole herd might be rapidly diminished by the slaughter of females and the consequent diminution of the birth rate, and still 100,000 males continue to be taken for a time without damage. How soon a point would be reached at which so large a draft of males from a constantly diminishing number of births would operate to produce an insufficiency of males, is a problem which from want of precise knowledge of the relative numbers of the sexes, it would be difficult to solve.

The British Commissioners' Report upon this subject is as follows:

The systematic and persistent hunting and slaughter of the fur-seal of the North Pacific, both on shore and at sea, has naturally and inevitably given rise to certain changes in the habits and mode of life of that animal, which are of importance not only in themselves, but as indicating the effects of such pursuit, and in showing in what particular this is injurious to seal life as a whole. Such changes doubtless began more than a century ago, and some of them may be traced in the historical precis, elsewhere given (Sec. 782 *et seq.*). It is unfortunately true, however, that the disturbance to the normal course of seal life has become even more serious in recent years, and that there is therefore, no lack of material from which to study its character and effect even at the present time.

In the zeal of their advocacy on behalf of pelagic sealing and their denunciation of the methods in use on the Islands, the Commissioners have experienced much and evident difficulty in framing their theory. If they admitted, in unqualified terms, a decrease in number, the obvious deduction from the concession would be that the unlimited slaughter of females must bear the blame and burden of such a result. To that extent pelagic sealing must be condemned. If, on the other hand, they should assert that the number actually increased, this

would only be consistent with an approval of the methods in use on the land. Between this Scylla and this Charybdis a way of escape must be found and it was found. The ingenuity here displayed deserves full notice and acknowledgment. The Joint Report contains this statement:

We find that since the Alaska purchase a marked diminution in the number of seals on and habitually resorting to the Pribilof Islands has taken place, that it has been cumulative in effect and that it is the result of excessive killing by man.

Bearing in mind that the fur-seals forming the object of this controversy have no other home or land than the Pribilof Islands, and that the British Commissioners themselves concede that they, *for the most part, breed* on those islands; bearing in mind, too, that these gentlemen have not yet discovered any other *summer habitat* for the seals, it would seem that this declaration is equivalent, in its fair sense and meaning, to a statement *that the fur-seals that frequent the American coast and the Bering Sea have suffered a marked decrease.*

Perhaps it was so intended by the British as it was by the United States Commissioners; but if so, the former gentlemen have lost sight of their original intention and have been led to nice distinctions, which we shall now examine.

That the seal, although "essentially pelagic" (Sec. 26), has not yet learned to breed at sea is not denied, although to the vision of the Commissioners the prospect of such a transformation or evolution is evidently not very remote. We must, in justice to them, quote one single passage which admirably illustrates the complacency and self-confidence with which they wrest to their own purposes, with unhesitating violence, the laws of nature and the mysteries of ulterior evolution. If this quotation does not give a just idea of the imaginative powers of these officials nothing but a perusal of the whole of their work will do them justice:

The changes in the habits and mode of life of the seals naturally divide themselves into two classes, which may be considered separately. The first and most direct and palpable of these is that shown in the increased shyness and wariness of the animal, which, though *always pelagic* in its nature, has been *forced by circumstances* to shun the land more than before, so that, but for *the necessity imposed upon it of seeking the shore at the season of birth of the young, it might probably ere this have become entirely pelagic.*

An animal "always pelagic," *forced by circumstances to shun the land more than before, and which would become entirely pelagic long before*

this if it were not *obliged* to seek the shore for so trifling an object as giving birth to its young certainly deserves to be classed among the curiosities of nature. The difference between animals (now) *always* pelagic and those (in the future) *entirely* pelagic may not readily be understood without explanation not vouchsafed. How can *they be always pelagic* if they are obliged to seek the land or perish and why is it reasonable to talk of the probability of their becoming something different from what they are when that conjecture is based upon nothing but reckless and grotesque assumption? Of course this and other specimens of affront to common sense are merely gratuitous and pointless vagaries. But the thesis must be sustained viz: that the seals are not even amphibious animals; their resort to land is a merely accidental necessity, and therefore the United States can no more claim a right to or possession in them than in other "essentially pelagic animals," such as the whale, the codfish, or the turbot.

If anything more were needed to emphasize the absurdity of this defiance of well-known facts and settled distinctions in the animal world we might still further cite the British Commissioners on the subject of the seal *pelage* or shedding of hair. It seems that these pelagic animals were not endowed by nature with the proper skin to perform this function in their native element. Unless they can find a suitable place *out of water* they retain the old hair and disregard the laws which would compel an annual shedding. Lest this seem an exaggeration, read their Report citing Mr. Grebnitsky: "During the 'stagey' or shedding season their *pelage becomes too thin to afford a suitable protection from the water*. (See section 202, also 281, 631, 632.)

It is hardly necessary to say that this theory, so gravely and seriously advanced, that the seal is naturally and essentially a pelagic animal, is utterly unsustained by evidence, is refuted by the language of the Commissioners themselves and disputed by elementary writers. It is only necessary to ascertain how naturalists define pelagic animals and then compare such definition with the known characteristics and rudimentary elements of seal life (see especially for this the books of Johns Hopkins University). Besides, the unanimous and unquestioned testimony of the agents for the Government and the company shows that the fur-seals spend at least four months of the year on the Pribilof Islands.

Having found, with the American Commissioners, a *marked diminution* in the number of seals on and habitually resorting to the Pribilof Islands, the British Commissioners proceed to show that the seals are

more numerous than ever. They have, no doubt, demonstrated this to their entire satisfaction on pages 72 and 73 of their Report. Capt. Warren they quote as saying that he noticed *no diminution* in the number of seals during the twenty years that he had been in the business, and, if any change at all, an increase. (Sec. 403.) To the same effect, Capt. Leary, who says that in the Bering Sea they were *more numerous than he had ever seen them* (Sec. 403); while Mr. Milne, collector of customs at Victoria, reports, what others have said to him, that owners and masters do not entertain the slightest idea that the seals are scarce. (Sec. 403.) What a tribute this must be to the management of the Pribilof Islands if, notwithstanding the conceded destruction of gravid and nursing females, these statements should be true. Capt. W. Cox took 1,000 seals in four days, *100 miles to the westward of the Pribilof Islands.* (Sec. 405.) He found the seals much more plentiful in Bering Sea than he had ever seen them before. It would have added much to the interest of Capt. Cox's statement if he had told us how many of these seals gave evidence of having left their pups at home.

The British Commissioners multiply the evidence to show that the general experience as stated to them has been that seals were equally or more abundant at sea at the time of their examination than they had been in former years. It is difficult to treat this with the respect that a report emanating from gentlemen of character and high official position should meet. Either the statement in the Joint Report is true and the assumption of an increase is untrue, or *vice versa*. In view of the evidence that these seals have no other home than the Pribilof Islands, it is plain, beyond the necessity of demonstration, *that all the seals killed by Capt. Cox and others in the Bering Sea were inhabitants of those islands*, and the testimony only goes to show that the mothers do go out to sea 100 miles or more, as is sworn to by the witnesses for the United States, and that it is while they are on the feeding grounds, or searching abroad for food, that they are captured by the Canadian poachers. If this is not so, then let the Commissioners or those advocating their views tell us where these seals slaughtered by Capt. Cox and others found their "summer habitat".

Any pretense that the seals are decreasing *at home*—*i. e.*, where they live through the summer, and breed, and nurse, and shed their hair—and at the same time are increasing in the sea is simply an absurdity. It would have added much to the value of the testimony of all these

masters if they had not sedulously avoided stating the sex of the animals that they killed.

There is one, and one explanation only, of this, and that explanation makes the stories above quoted plausible. The pelagic sealers were engaged in hunting nursing mothers on the feeding grounds, where those animals are found in large numbers. The decrease proved, and, indeed, admitted to exist (see Joint Report), had not yet been so great as to be manifest to those sealers who were so fortunate as to fall in with a number of females either intent upon finding the food necessary to produce a flow of milk or sleeping on the surface of the water after feeding.

And here we may note another illustration of the *thesis* and its advocacy. Having satisfied themselves that pelagic sealing rather operated to increase the supply of seals, they remembered that the killing of young males was objectionable and likely to result in extermination, and thereupon discovered the fact that "a meeting of natives was held" at which the aborigines unanimately expressed the opinion that the seals had diminished and would continue to diminish from year to year (an opinion, too plain, we think, for argument), but they at once assign the reason, which is not the killing of many females, but the extraordinary fact that "*all the male seals* had been slaughtered without allowing any to come to maturity upon the breeding grounds" (Sec. 438).

Having thus proved that the seals were in a flourishing condition of increase, and that they were decreasing in an alarming degree, the conclusion is reached that the decrease is on the land and the increase in the water:

The general effect of these changes in the habits of the seals is to minimize the number to be seen at any one time on the breeding islands, while the average number to be found at sea is, at least proportionately, though *perhaps* in face of a general decrease in the number of seals, not absolutely increased (Sec. 445 of British Commissioners' Report).

Would it be irrelevant to inquire what was the "summer habitat" of the numerous seals slaughtered by Capt. Warren, Capt. Leary, and Capt. Cox? Were they not *all* of the Pribilof family? Did not the Commissioners who quoted Capt. Cox to the effect that he had, no doubt in true sportsmanlike fashion, with a shotgun, killed 250 seals a day for four days, know that the enormous majority of these were nursing mothers, whose *pups* were starving at home?

IX.—DESTRUCTION BY PELAGIC SEALING AND ITS EXTENT—THE
REMEDY PROPOSED BY THE BRITISH COMMISSIONERS—THE
TRUE AND ONLY REMEDY CONSISTS IN ABSOLUTE PROHIBITION
OF PELAGIC SEALING.

It has been heretofore sought to show that the Commissioners for Great Britain in drawing up the report had endeavored to reach a conclusion favorable to the slaughter of seals at sea, an "industry," as they call it, in which they apparently saw little that was objectionable and which they believed it to be the interest and policy of their country to protect. In the course of their examination, however, they have necessarily been furnished with facts palpably inconsistent with their theory and have been reluctantly compelled to produce proofs of the barbarous, savage, and destructive processes by which the Canadian poachers secured their prey.

(a) The Commissioners allude in sarcastic vein to the fact that "there is a 'remarkable agreement' found among those interested in decrying pelagic sealing, to the effect that the pelagic sealers do and must kill a large number of female breeding seals." Why this "agreement," which undoubtedly exists, should be mentioned as "remarkable," we fail to perceive, the evidence produced by the Commissioners themselves plainly showing that no discrimination is or can be made by the pelagic hunters and that they slaughter indiscriminately all the animals that appear within reach of their shotguns. They themselves admit that "a considerable proportion of gravid females" are slain (Sec. 648), and their own witnesses describe the process of skinning them on deck, in the course of which milk and blood flow freely together, while in some cases fully formed young are taken from the slaughtered mothers. Under such circumstances there is no ground for any criticism nor any reason shown why general acquiescence in such a proposition should be treated with a sneer upon the truth of the statement.

(b) It is *certain*, they say, that *females with milk* are *occasionally* killed at sea by the pelagic sealers (Sec. 314). That they should not be able to give the exact proportion of the pregnant and nursing females to the rest may be due to the fact that their informants, while exulting over the large slaughter that they succeeded in accomplishing in Bering Sea, do not appear to have stated how many of such breeding females they had succeeded in capturing (page 73).

(c) It is claimed, however, that pelagic seal-fishing is not the only cause for the decrease of the seals on the Pribilof Islands, and this is supported by a quotation to be found at page 187 of their Report, as to the probable fate of the fur-seal in America. The paragraphs relating to the objectionable features of pelagic seal-fishing seem to be omitted and indicated by asterisks, but the paper is quoted to show that driving of the seals on the island is one of the evils which may be remedied. The conclusion of Mr. Palmer, the authority thus cited, is (1) *that no seals should be killed by any one at any time in the waters of Bering Sea*; (2) that all seals driven on the islands should be killed; none, he says, should be driven and again allowed to enter the sea (p. 189). Certainly Mr. Palmer's paper is very interesting and if his facts and conclusions are adopted *pelagic "seal-fishing"* must be prohibited. "The killing of seals as conducted on the islands," he says, "is as near theoretical perfection as it is possible to get it. They are quickly dispatched and without pain. One soon recognizes, as in the killing of sheep, that in the quickness and neatness of the method lies its success, all things considered" (p. 187). This certainly does not agree with the "sportsmaulike" view of the British Commissioners, but embodies what we might call the humane and common-sense aspect of the subject by showing that, so far from the desirability of giving the seal "a chance for its life," there should be a selection made in each case and the animal should be painlessly and immediately slaughtered. The object should be, not to provide sport to adventurous men and keen hunters, but to secure as many animals as possible with humanity and a due regard to the preservation of the race.

(d) It is respectfully submitted that as between the two systems, one of which is "theoretically perfect" and in the course of which the animals are selected and "promptly and neatly killed," on the one hand, and indiscriminate sealing at sea on the other, there can be no room for hesitation. But the evident and unquestionable superiority of the methods adopted on the islands consists, also, in the fact that it is by its nature susceptible of indefinite improvement. No argument is needed to show that the "theoretical" perfection may with care become "practical" perfection, and that if driving be really open to the objections made by Mr. Palmer it is not impossible—indeed, it must be comparatively easy—to remedy them in the manner suggested by himself or otherwise. In the preservation of pelagic sealing all concur that it is impossible to select

the seals which it is desirable to kill and that the circumstances and nature of the animal are such that in most cases the female pregnant or giving suck must fall a victim to the weapons of the poacher. Indeed the British Commissioners themselves state (Sec. 648) that it is *generally admitted* that a *considerable portion* of gravid females are found among the seals taken in the early part of each sealing season. Between two such systems, we repeat, there can be no hesitancy as to which should be preferred, the one based on humane and intelligent principles, and which the interest of the parties concerned would naturally make as perfect as possible, the other, which by its very nature leads to brutality and undue destruction, and which is profitable only when it is cruel and indiscriminate. These considerations are reinforced by the very significant fact that the *breeding females when found at sea are always pregnant or nursing, and frequently both*. This follows from the undisputed facts (1) that the period of gestation is over eleven months; (2) that they reach the islands when on the point of delivery; (3) that they remain there until fertilized, and (4) that during the period of their stay they nurse the young, which depend wholly upon their milk for sustenance.

(e) The British Commissioners' suggestion as a remedy for the slaughter of the mothers and nurses, contained in section 155, subdivision c, does not seem to be one which can have been very seriously entertained by themselves. They suggest a provision that a close season be provided *extending from the 15th of September to the 1st of May in each year*, during which all killing of seals shall be prohibited, with the additional provision that no sealing vessels shall enter Bering Sea *before the 1st of July in each year*. They state as a fact in section 649 that "Bering Sea is *now usually entered* by the pelagic sealers between the *20th of June and the 1st of July* and in Bering Sea the same conditions hold" that are described in section 648, namely, that a *considerable portion of gravid females are found among the seals taken in the early part of each sealing season*. They also say that the pregnant females begin to "bunch up" and to travel fast toward Bering Sea, at the latest, *the 1st of June*. In other words, *the best season for killing nursing and pregnant females in the Bering Sea is precisely the season recommended by the commissioners as the proper one for allowing the slaughter*. Surely the pelagic sealers could ask no better protection for their "industry" in Bering Sea than this, nor could any better method of continuing the abuse and hastening the destruction be devised than opening the catch to the pelagic sealers at their favorite season.

To understand this extraordinary recommendation fully, sections 648 and 649 of the British Commissioners' Report should be read together. It may be taken for granted that the pelagic sealers need not be told when the hunting season in Bering Sea is at its best. Experience has taught them, and they have profited by the instruction, that their operations in Bering Sea could be most profitably conducted *during the months of July and August*. Hence it has been their usage to *enter Bering Sea between June 20 and July 1* (Sec. 649). They would probably not rebel against a possible and occasional delay in opening the season, by ten days. The nursing mothers would be still especially open to capture, and would still constitute the staple article of their "industry." In their search for food and in the instinctive confidence which the mothers of dependent offspring almost universally exhibit the seals would be less "wary" than at other seasons, and good shots might still carry on their mission of destruction with the superadded comfort that their business was made reputable by law. As if to make even this small restriction upon the liberty of the pelagic sealer less objectionable, he is reminded that "after about the 20th of May or at the latest the 1st of June, very few females with young are taken." (Sec. 648.) His loss would thus be trifling so far as Bering Sea as a field of profitable operation is concerned. It seems that in fine sealing weather the schooners can not keep up with the females. Hence they are not all slaughtered. At this time, after May 20, or June 1, the pregnant females begin to "bunch up" and the catch consists chiefly of young males and barren females (Sec. 648). Why, then, even this restriction? When are the breeding females captured? Is it really intended to assert that the only injury done is that "at a later date in the summer *a few females in milk*, and therefore presumably from the breeding places on the islands, are occasionally killed, but no large numbers?" So extraordinary a statement made in the face of overwhelming proofs requires no discussion. The British Commissioners should have vouchsafed information as to the thousands of *nursing* mothers killed during the season from July to September and should have told us whence they came and where was their "summer habitat." It is very likely, as they assert, that *very few females with young* are taken after June 1. The obvious reason is that they have become nursing mothers by the 1st of July, those that escaped the shot-gun, the rifle, the spear, and the gaff having found temporary shelter and protection on the islands.

(f) Although we have laid much stress upon this in other parts of

this argument, the subject is so important that we again recur to it and call attention once more to the admissions and inconsistencies in the British Commissioners' Report. The Commissioners in section 612 exhibit much indignation at the free use that has been made of the appellation "poachers" as applied to the pelagic sealers in general and to Canadian sealers in particular. This, they say, has been done with the obvious purpose of prejudicing public opinion. They then proceed to claim that "adventurers" from the United States are mainly responsible for the reduction of seals brought about in the southern seas. The killing of seals, they say, has always and everywhere been carried out in the indiscriminate, ruthless, and wasteful manner described in detail in several of the works cited in their Report, and in most cases a greater part of the catch has consisted of females. (Sec. 612.) It is certainly no part of the purpose of counsel for the United States to defend "adventurers" guilty of these barbarous practices, whatever the nation to which they belong. It is rather a question of humanity than of nationality, and the United States would not hesitate to undertake and to assure the repression of practices which can not be described in over-harsh terms if their own citizens alone were engaged in the business. It is only to prevent "the indiscriminate, ruthless, and wasteful slaughter" by persons who claim the protection of a foreign flag that these methods of arbitration are resorted to.

But the waste of the seals lost, in addition to the destruction of the fetus or of the pup, as the case may be, is shown to some extent by the Report of the Commissioners for Great Britain. We refer especially to sections 613, 614, 615, 617, 618, 619, 620, 621.

The discrepancy between the two classes of statements given by themselves is very marked. The agents of the United States, captains in the United States Navy, the superintendents, and others testify that 40 to 60 per cent of the seals are lost. It would seem, however, from the testimony in defense of pelagic slaughter that old hunters are much more successful than the young ones. Green hands, says the captain of the *Eliza Edwards*, might lose as much as 25 per cent of the seals shot, but experienced hunters would bag their game to the extent of 95 per cent; that is to say, they would lose but 5 per cent of the females shot. (Section 625.) The number of green hands on board the schooner *Otto*, on which Robert H. McManus, a journalist, was a passenger, sailing for his health, must have been very great in proportion to the whole crew. It seemed to him that they did not get

over one seal to every hundred shot at. (Vol. II, p. 335, of the Appendix to the Case of the United States.)

We shall now lay before this High Tribunal additional testimony as to the nature and extent and effect of pelagic sealing. The extracts and references about to be given may seem monotonously cumulative, but it is important to show, otherwise than by mere affirmation, how far the existence of the herd is menaced and how soon extermination may be expected unless prompt and efficient measures of redress be adopted.

The evidence of credible witnesses, dealing neither in generalities nor in speculation, leaves no doubt as to the appalling extent of the massacre. It is impossible to assume that the witnesses produced for the United States deliberately perjured themselves as to numbers, dates, and distances. Even if any reason were given for throwing a suspicion upon their character, the reticence of many of the witnesses examined by the British Commissioners as to the sex of the animals killed is significant. It is to the credit of these persons that while they did not hesitate to state that they had slain large numbers of seals in Bering Sea without discrimination, they refrained from giving any precise data as to the sex of the animals that they captured.

If, however, it is desired to know how far this ruthless and exterminating process is carried, the desire for information may readily be gratified.

The sealing schooner *Favorite*, McLean, master, according to Osly, a native sealer who went to the Bering Sea on her as a hunter, captured 4,700 seals, most all of which were cow seals giving milk. They were captured at a distance of about 100 miles from the Pribilof Islands.

In 1888 the same hunter was on board the *Challenger*, Captain Williams, master. They were less successful and caught only about 2,000 seals, most of which were cows in milk.

In 1889, he again went to sea on the schooner *James G. Swan*, but the seals were not so abundant; they were rapidly decreasing. (Appendix to the Case of the United States, Vol. II, pp. 390, 391.)

Niels Bonde (*ibid.*, p. 315), of Victoria, British Columbia, was a seaman on board the schooner *Kate*. He went to the Bering Sea, arriving there in July, and left in the latter part of August. They had caught about 1,700 seals in that time between the Pribilof Islands and Unalaska. These were caught from 10 to 100 or more miles off St. George Island. The seals caught in Bering Sea were females that had given

birth to their young. He often noticed milk flowing out of their breasts. He had seen live pups cut out of their mothers and live around on the decks for a week.

Peter Brown (*ibid.*, p. 377), a native, part owner of a schooner for about seven years and owner of the *James G. Swan* for about three years; hunted in Bering Sea in 1888; the catch was nearly all cows that had given birth to their young and had milk in their teats. His people hunted with the spear and therefore did not lose many that they hit.

Thomas Brown, No. 2 (*ibid.*, p. 406), made a sealing voyage to the North Pacific and Bering sea on the *Alexander*. They caught 250 seals before entering the sea, the largest percentage of which were females, most of them having young pups in them. He saw some of the young pups taken out of them. They entered the sea about the 1st of May and caught between 600 and 700 seals, from 30 to 150 miles off the seal islands. Four out of five were females in milk. He saw the milk running on the deck when he skinned them. They used mostly shotguns, and got on the average 3 or 5 out of every 12 killed and wounded. Evidently these were what has been termed "green hands."

Charles Challall, who has been heretofore quoted, a sailor in 1884 on the *Vanderbilt*, in 1889 on the *White*, and in 1890 on the *Hamilton*, gives his experience, which may be found at pages 410 and 411. They captured a great many seals on the fishing banks just north of and close by the Aleutian Archipelago. Most of the seals they killed going up the coast were females heavy with pup. He thinks nine out of every ten were females. At least 7 out of 8 seals caught in the Bering Sea were mothers with milk.

Circus Jim (*ibid.*, p. 380), a native Makah Indian, captured a great many cow seals that were giving milk. Most of the seals he caught in the sea were giving milk. His theory as to the decrease of the animal, which he states as an undoubted fact, is that the white hunters had been hunting them so much with guns. "If so much shooting at seals is not stopped they will soon be all gone."

James Claplanhoo (*ibid.*, p. 381), a native Makah Indian, evidently found the business profitable, for he was the owner of the schooner *Lottie*, of 28 tons burden. Formerly he used nothing but spears in hunting seals, but he had since that resorted occasionally to the use of a gun. He says that about one-half of all the seals that he had captured in the Sea or on the coast were full grown cows with pups in them. In 1887, about the first of June, he went into Bering Sea in his own

schooner, the *Lottie*, and hunted about sixty miles off the Islands, and secured about 700 seals himself, all of which were cows in milk. These cows had milk in their breasts but had no pups in them. He returned to Bering Sea in his own boat, the *Lottie*, in 1889, and also in 1891, and sealed all the way from 100 to 180 miles from the St. George and St. Paul Islands. The catch of those two years was about the same as those caught in 1887, that is, mostly females that had given birth to their young and were in milk.

Louis Culler (*ibid.*, p. 321). According to him the white hunters in 1888 must have been nearly all "green hands," for they did not secure more than two or three out of every 100 shot. He was aboard the *Otto* in 1891, on board of which were two newspaper correspondents, King-Hall, representing the New York Herald, and Mr. McManus, of Victoria. They entered the sea through the Unamak Pass and captured therein about 40 seals, most all of which had milk in their breasts. After taking these seals they returned to Victoria, British Columbia, about the 25th of September.

John Dalton was a sailor and made a sailing voyage to the North Pacific and Bering Sea in 1885 on the schooner *Alexander*, of which Captain McLean was master. They left Victoria in January and went south to Cape Flattery and Cape Blanco, sealing around there about two months, when they went north, sealing all the way up to the Bering Sea. They had between 100 and 300 seals before entering the sea. Most all of them were females with pups in them. They entered the sea about June and caught about 900 seals in there, two-thirds of which were mother seals, with their breasts full of milk. He saw the milk flowing on the decks when they skinned them.

Alfred Dardean (*ibid.*, p. 322), a resident of Victoria, British Columbia, and during the two years preceding the making of his deposition, which was in April, 1892, he had been a seaman on the schooner *Mollie Adams*. They left Victoria, British Columbia, on the 27th of May, 1890, and commenced sealing up the coast, toward Bering Sea. They entered Bering Sea through the Unamak Pass about July 7, and sealed around the eastern part of Bering Sea until late in the fall. They caught over 900 seals before entering the sea, and the whole catch during that year was 2,159 skins. Of the seals that were caught off the coast fully ninety out of every one hundred had young pups in them. The boats would bring the seals killed on board the vessel, and they would take the young pups out and skin them. If the pup was a good

one they would skin and keep it for themselves. He had eight such skins himself. Four out of five, if caught in May or June, would be alive when they cut them out of the mothers. They kept one of them nearly three weeks alive on deck by feeding it on condensed milk. One of the men finally killed it because it cried so pitifully. They got only three seals with pups in them in the Bering Sea. Most all of them were females that had given birth to their young on the island, and the milk would run out of the teats on the deck when they were skinned. They caught female seals in milk more than 100 miles off the Pribilof Islands.

The same witness states that they lost a good many seals, but he does not know the proportion that was lost to the number killed. Some of the hunters would lose four out of every six killed. They tried to shoot them while asleep, but shot all that came in their way. If they killed them too dead a great many would sink before they could get them, and these were lost. Sometimes they could get some of them that had sunk by the gaff hook, but they could not get many that way. A good many were wounded and escaped only to die afterward.

Frank Davis (*ibid.*, p. 383), a native Indian of the Makah tribe, was sealing in the Bering Sea in 1889. He says, agreeing in this with all the other witnesses, that nearly all of the full-grown cows along the coast have pups in them, but the seals that he caught in Bering Sea were most all cows in milk.

Jeff Davis (*ibid.*, p. 384), and also a native Makah Indian, says that most of the seals that were captured there that season—that is, in 1889—were cows giving milk.

Capt. Douglass (*ibid.*, p. 420): His testimony is that a very large proportion of the seals killed along the coast and at sea, from Oregon to the Aleutian Islands, are female seals with pups; in his judgment not less than 95 per cent, as has been quoted heretofore. He also says that the proportion of female seals killed in Bering Sea is equally large.

Peter Duffy (*ibid.*, p. 41). By occupation a seaman on board the *Sea Otter*, Captain Williams, master. They left San Francisco and fished up the coast until they entered Bering Sea in July, and sealed about the sea until they were driven off by the revenue cutter *Corwin*. From there they went to the Copper Islands. The whole catch amounted to nine hundred skins, and most of them were killed with rifles. They only got one out of about eight that they shot at, and they were most all females giving milk or in pup. When they cut the

hide off you could see the milk running from the breasts of the seals. The second year they were more fortunate and got over 1,300 skins; some of them were cows with pups in them, and almost all of the rest were cows giving milk, and some of the latter were killed as far from the rookeries as Unimak Pass.

William Fraser (page 426), of San Francisco, had made three trips to the North Pacific and Bering Sea within the last six years. His business was that of a laborer; he acted as a boat-puller. They used shotguns and killed about 300 seals in the North Pacific. Most of the females killed had unborn pups or were cows giving milk. The next trip that he made was on the *Vanderbilt*. They did not enter the Bering Sea on that trip either. They got about 350 seals, almost all females. Finally he made a trip on the *C. G. White*, but does not know if he was on the American side or not. They killed about 600 seals on that trip, nearly all females. He noticed when they skinned them that they were females in milk, as the milk would run from their breasts on to the deck.

John Fyfe (*ibid.*, p. 429), of San Francisco, a sealer and boat-puller on the schooner *Alexander*, McLean, master. They entered Bering Sea about April and got 795 in there, the largest part of which were mother seals in milk. When they were skinning them the milk would run on the deck. Some were killed 50 to 100 miles off the seal islands. When they shot the seals dead they would sink and they could not get them.

Thomas Gibson (*ibid.*, p. 431) had been engaged in sealing for ten years. He gives his experience in detail and the number of seals that he killed in each season. He says:

I did not pay much attention to the sex of seals we killed in the North Pacific, but know that a great many of them were cows that had pups in them, and we killed most of them while they were asleep on the water. I know that fully 75 per cent of those we caught in the Bering Sea were cows in milk. We used rifles and shot guns and shot them when feeding or asleep on the water. An experienced hunter, like myself, will get two out of three that he kills, but an ordinary hunter would not get more than one out of every three or four that he kills.

Arthur Griffin (*ibid.*, p. 325), a seafaring man who resides at Victoria, British Columbia, sailed from that place on February 11, 1889, as a boat-puller on the sealing schooner *Ariel*, Buckman, master. She carried six hunting boats and one stern boat and had a white crew who used shotguns or rifles in hunting seals. They began sealing off the northern coast of California and followed the sealing herd northward, capturing about 700 seals in the North Pacific Ocean, two-thirds

of which were females with pup; the balance were young seals, both male and female. They entered Bering Sea on the 13th of July, through the Unimak Pass and captured between 900 and 1,000 seals therein, most of which were females in milk. They returned to Victoria on the 31st of August, 1889.

It will be observed here that Arthur Griffin's experience and success would not lead him probably to object to the *modus operandi* suggested by the British Commissioners. His operations by which 900 or a 1,000 seals, mostly females in milk, were secured in the brief space of six weeks, could be carried on not only with equal propriety, but with the additional advantage of being lawful.

His experience in 1889 was not exceptional. He went out again in 1890 in the *E. B. Marrin*, McKiel, master. They again captured between 900 and 1,000 seals on the coast, most of which were females with pups. They entered the sea on July 12 through Unimak Pass and captured about 800 seals in those waters, about 90 per cent of which were females in milk. His experience was that a good hunter will often lose one-third of the seals he kills. A poor hunter will lose two-thirds of those he shoots. On an average hunters will lose two seals out of three of those they shoot.

M. A. Healey (*ibid.*, p. 27). Capt. Healey, an officer in the United States Revenue Marine service, on duty for nearly the whole of twenty-five years in the waters of the North Pacific, Bering, and Arctic seas. He speaks from experience and says:

My own observation and the information obtained from seal-hunters convince me that fully 90 per cent of the seals found swimming in the Bering Sea during the breeding season are females in search of food, and the slaughter results in the destruction of her young by starvation. I firmly believe that the fur-seal industry at the Pribilof Islands can be saved from destruction only by a total prohibition against killing seals, not only in the waters of Bering Sea, but also during their annual immigration northward in the Pacific Ocean.

This conclusion is based upon the well-known fact that the mother seals are slaughtered by the thousands in the North Pacific while on their way to the islands to give birth to their young, and extinction must necessarily come to any species of animal where the female is continually hunted and killed during the period required for gestation and rearing of her young; as now practiced there is no respite to the female seal from the relentless pursuit of the seal-hunters, for the schooners close their season with the departure of the seals from the northern sea and then return home, refit immediately, and start out upon a new voyage in February or March, commencing upon the coast of California, Oregon, and Washington, following the seals northward as the season advances into the Bering Sea.

James Kean (*ibid.*, p. 448), a resident of Victoria, British Columbia, and seaman and seal hunter, gives his experience. He went seal-hunting in 1889 on the schooner *Oscar and Hattie*. He left Victoria in the latter part of February and went off south to the Columbia River, and commenced sealing off there and followed the herd along the coast up to Bering Sea, arriving there some time in June. They captured somewhere about 500 seals before entering the sea. There were a good many females among them. The old females had young pups in them. He saw them taken out and a good many of them skinned. They entered the sea and caught about 1,000 in there. Sometimes they were over 150 miles off the seal islands; sometimes they were nearer. He paid no attention to the proportion of females, but he knows that they skinned a great many that were giving milk, because the milk would run from their breasts onto the deck while they were being skinned. They killed mother seals in milk over 100 miles from the seal islands. They generally got them when they were asleep on the water. He went out again in the *Walter Rich* in 1890, with very much the same experience. He thinks that he got half of what he killed and wounded, but he did not believe that the green hunters get more than one out of every four or five that they kill.

For detailed and circumstantial evidence that the proportion of females taken to males was enormous, and that nearly all of these when taken in Bering Sea were nursing cows, see: William Hermann, page 445; Norman Hodgson, page 366; O. Holm, page 366; Alfred Irving, page 356; Victor Jacobson, page 328.

James Jamieson, (*ibid.*, p. 329): This witness, Jamieson, had been sailing-master of several schooners and had spent six years of his life sealing. He testified that he always used a shot-gun for taking seals; that over half were lost of those killed and wounded. A large majority of the seals taken on the coast were cows with pups. Once in a while an old bull is taken in the North Pacific Ocean. No discrimination was used in killing seals, but everything was shot that came near the boat in the shape of a seal. The majority of seals killed in Bering Sea are females. He had killed female seals himself 75 miles from the islands, and they were full of milk.

To the same effect as to the large proportion of females nursing their young, see James Kennedy, (*ibid.*, p. 449).

James Kiernan, who had been engaged in sealing since 1843:

My experience, [he says,] has been that the sex of the seals usually killed by hunters employed on vessels under my command, both in the

North Pacific Ocean and Bering Sea, were cows. I should say not less than 80 per cent of those caught each year were of that sex. I have observed that those killed in the North Pacific were mostly females carrying their young, and were generally caught while asleep on the water, while those taken in the Bering Sea were nearly all mother seals in milk, that had left their young and were in search of food. My experience convinces me that a large percentage of the seals now killed by shooting with rifles and shotguns are lost. My estimate would be that two out of every three killed are lost.

See the testimony of Francis R. King-Hall, the journalist.

Edward Nighl Lawson, a resident of St. Pauls, Kadiak Island, Alaska (*ibid.*, p. 221), killed females in milk in Unimak Pass, and even out in the Pacific Ocean 200 miles from land. They can not distinguish between the sex of fur-seals in the water; on the contrary, everything in sight is taken, if possible, except large bulls, whose skins are useless. He recommends, in order to prevent the extermination of the fur-seal species, that a close season in the North Pacific Ocean and in Bering Sea should be established and enforced from April 1 to November 1 in each year.

Abial P. Loud (*ibid.*, p. 37), a resident of Hampden, Me., special assistant treasury agent for the seal islands in 1885, 1886, 1888, and 1889.

William McIsaacs (*ibid.*, p. 450).

Capt. James E. Lennan (*ibid.*, p. 369), master mariner of eight years' experience.

William McLaughlin (*ibid.*, p. 451), boat-puller on board the *Triumph*.

Robert H. McManus (*ibid.*, p. 335), a journalist, whose qualifications have been spoken of heretofore, gives, on pp. 337 and 338, extracts from his diary. This deposition should be read in whole.

Patrick Maroney (*ibid.*, p. 464), of San Francisco, a seaman.

Henry Mason (*ibid.*, p. 465), of Victoria, British Columbia.

Moses (*ibid.*, p. 309), a native Nitnat Indian, gives his experience in 1887 on the schooner *Ada*. They sealed around Unalaska, but did not go to the Pribilof Islands. They caught 1,900 seals. Most all of them were cows in milk, but when they first entered the sea they killed a few cows that had pups in them. The next year they secured only 800, and the year following eight or nine hundred. The seals caught were mostly cows with milk.

John O'Brien (*ibid.*, p. 470), of San Francisco, a longshoreman, made a sealing voyage to the North Pacific and Bering Sea on the Schooner *Alexander*, which sailed from Victoria in January, 1885. He was a boat puller. They headed north into the Bering Sea which they entered at

the latter end of May. Up to that time they had caught 250 or 300 seals of which 80 per cent were females. After they entered the Bering Sea they caught about 700 seals, most all of them being females in milk. He also shows that there is a very considerable waste of life from killing or wounding and losing animals.

John Olsen, (*ibid.*, p. 471) of Seattle, Wash., a ship-carpenter, entered the Bering Sea about the 5th of June, 1891, on board the *Labrador*, Capt. Whiteleigh, commander. They were ordered out of the sea on the 9th of June. In going up the coast to Unimak Pass they caught about 400 seals, mostly females with young, and put their skins on board the *Danube*, an English steamboat at Allatack Bay, and after they got into the Bering Sea caught about 220. After entering the sea they got one female with a very large pup, which he took out alive and which he kept for three or four days when it died as it would not eat anything. All the others had given birth to their young and their breasts were full of milk. He also states how large a loss is made by failure to recover the animals that are killed.

Osly (*ibid.*, p. 391), a native Makah Indian, went to the Bering Sea in 1886 on board the *Favorite*, McLean, master. They captured about 4,700 seals, almost all of which were cows giving milk. Four years before that he had gone to Bering Sea as a hunter in the sealing schooner *Challenger*, Williams, master. There were 3 white men in each boat and 2 Indians in a canoe. We caught about 3,000 seals, most of which were cows in milk.

William Short (*ibid.*, p. 348), of Victoria, British Columbia, is by occupation a painter. On January 14, 1890, he sailed as a boat-puller from Victoria on the British sealing schooner *Maggie Mac*, Dodd, master. She carried six sealing boats that were manned by three white men each, who used breech-loading shotguns and rifles. On the 12th of July they entered the sea through the Unimak Pass. Before this they had captured 1,120 seals on the coast. They lowered their boats on the 13th and captured about 2,093 seals in those waters and then returned to Victoria on the 19th of September. In July, 1891, he sailed out of the port of Victoria as a hunter on the British sealing schooner *Otto*, O'Reily, master. Failing to procure the Indian crew of sealers that they had expected, they returned to Victoria, after proceeding up the coast, on the 1st of August. While cruising along the coast their principal catch was females with pups. Fully 90 per cent of all seals secured by them while in the Bering Sea were cows with milk; that is to say, out of 2,093 all but about 300 were nursing mothers.

Profitable as the business appears to have been to Mr. Short, he is candid enough to say that in his opinion—

It is a shame to kill the female seal before she has given birth to her young. Pelagic sealing in the North Pacific Ocean before the middle of June is very destructive and wasteful and should be stopped. * * * Sealing in the sea should be prohibited until such a time as the pup may have grown to the age at which it may be able to live without nurse from its mother.

James Sloan (*ibid.*, p. 477), of San Francisco, by occupation a seaman, made three voyages to Bering Sea, in 1871, in 1884, and in 1889. A great many of the females that they killed had their breasts full of milk, which would run out on the deck when they skinned them. In 1889 they went to the Okhotsk Sea and sealed there about two months. They got about 500 seals, of which more than one-half were females, and the most of them had pups in them. They entered Bering Sea about the 17th of May and caught about 900 seals. Most of them were mother seals.

Mr. Sloan predicts an early extermination of the seals unless the destructive processes are stopped. As he says, the hunters kill them indiscriminately and all the hunters care about is to get a skin.

See, also, the testimony of Fred Smith (*ibid.*, p. 349), of Victoria, a seal hunter.

Of Joshua Stickland (*ibid.*, p. 349), also of Victoria, a seal hunter who declares that out of 111 seals killed by him in the last year he killed but three bulls.

John A. Swain (*ibid.*, p. 350), of Victoria, a seaman, gives his experience in 1891. He was on board the steamer *Thistle*, Nicherson master. They caught about 100 seals. They were all females that had given birth to their young. In 1892 they caught 270; most of them pregnant females which were caught along the coast.

Theodore T. Williams (*ibid.*, p. 491), an intelligent gentleman, by profession a journalist, employed as city editor on the San Francisco Examiner, makes a very interesting deposition. In pursuit of his profession he had not only had occasion to make extended inquiries into the fur-sealing industry of the Aleutian Islands and the North Pacific, but had gone to the North and had made a complete and exhaustive examination of the open-sea sealing, its extent, probable injury, etc. The perusal of the whole of this very interesting document is recommended. As the result of his investigation in the Bering Sea and North Pacific he asserts the following facts:

First. That 95 per cent of all the seals killed in the Bering Sea are females.

Second. That for every three sleeping seals killed or wounded in the water only one is recovered.

Third. For every six traveling seals killed or wounded in the water only one is recovered.

Fourth. That 95 per cent at least of all the female seals killed are either in pup or have left their newly-born pup on the islands, while they have gone out into the sea in search of food.

The result is the same in either case. If the mother is killed the pup on shore will linger for a few days, some say as long as two or three weeks, but will inevitably die before winter. All of the schooners prefer to hunt around the banks where the female seals are feeding, to attempt to intercept the male seal on their way to and from the hauling grounds.

This overwhelming and practically uncontradicted evidence certainly justifies the statement of the British Commissioners as to the "remarkable agreement" upon the subject. How the facts could be disputed without impeaching witnesses taken from every class of society where knowledge could be found, it is impossible for us to conjecture. Officers from the Navy of the United States; British sea captains as well as American seamen, journalists, natives, all concur as to the fearful destruction which is going on. It is not possible to read the testimony, even making far more allowance for exaggeration than the nature of the case will justify, without reaching the conclusion that pelagic sealing must be stopped or all hope of preserving the herd abandoned. Palliation, compromise, and mitigating processes are out of the question. The outrage must be cut at the root and its continuance made impossible. Females that are pregnant eleven months of the year, and nursing mothers three or four months, must be left undisturbed, and if, as all agree, it is impossible to discriminate in pelagic sealing between the mothers and the males, then the other alternative is inexorably before us, and that is absolute interdiction.

(g) The principal fact that a decrease, alarming and continuous, has been noted, is by the proofs and admissions made evident. It required no proofs, as it is conceded by the Commissioners on both sides to exist, and it is for the purpose of remedying the evil that this Arbitration has been entered into. It is claimed on the part of the United States that the diminution which threatens extermination is *wholly* due to *pelagic sealing*, a practice which does not permit the hunter to spare the gravid or nursing females; while at the same time, and coöperating with this principal source of undue destruction, the methods used by the hunters frequently result in the death and simultaneous loss of the animal. It need hardly be said, that *prima facie*, to such a system

must be attributable the undue destruction which it is desired to prevent. Those who undertake the defense of such methods and of such a system can not complain if the burden of proof is placed upon them of justifying a course which has received the condemnation of mankind. It is difficult to perceive any good reason why the ordinary and usual rules that have always been followed as essential to the preservation of a species should be dispensed with in the case of the fur-seals. It matters little whether it is an absurdity or scientifically correct to designate them as essentially or naturally or wholly pelagic. Important controversies between enlightened nations will not turn upon nice questions of scientific nomenclature. The animal whose existence is at stake is useful to man, and it is therefore the interest and policy, as it will be to the honor of both nations, to preserve it. The time has long since gone by when the selfishness of nations may have been the controlling factor in such debates. But were it otherwise, Great Britain will suffer as seriously as the United States from the extermination of a herd of seals which the United States alone can preserve, which the United States alone can foster, guard, and protect, because it happens that the vital functions of procreation and delivery are performed on its soil. The United States may and will discharge this duty, to its own people and to the world, provided its efforts are not baffled and its beneficent action neutralized by the indiscriminate slaughter of which it complains.

That the Government of the United States has power, both in law and in fact, within the limits of its own jurisdiction no one disputes, but the suggestion is made that the methods adopted on the islands which constitute the only land resort of the seals are imperfect in practice while perfect in theory. Certain objections are made to show that while care is taken to preserve the female from destruction, so many young males have been slaughtered that the necessary vitality is lacking in the service of the females. Thus it is claimed that the two sources combine to endanger the permanency of the seal family, admitted and undue destruction at sea and unwise or excessive killing on the islands. Conceding for the sake of argument, and only for the argument, that this is true, it must be apparent that the necessity of preventing pelagic sealing is only the more pressing, in the interest of the industry which it is desired to conserve. The methods of the United States may be faulty, but it should not be forgotten that the Government is especially interested in maintaining an industry

which belongs to itself. The faults imputed are, after all is said, faults of detail and execution, which do not in any manner affect the principle adopted. They are susceptible of remedy, and it is idle and absurd to suppose that a valuable commerce, susceptible of expansion by judicious methods, will be wantonly suffered to go to ruin. Self-interest, if no higher motive, may be trusted to improve the means now in use, in so far as they may require improvement; experience will constantly throw its light upon the best means of performing the duty, while the apprehension of loss will stimulate the efforts of those most nearly concerned in the financial success of the business now carried on at the Islands.

But it is not, in fact, admitted that any such objections exist. The number of males killed did turn out to be excessive and was therefore reduced. This, however, only became manifest after the ruthless destruction at sea had begun to be felt on the Islands. That destruction is only limited by the capacity of the destroyers. They profess no scruples and they show no mercy. Their "legitimate business" requires courage and skill, it is said, but it is incompatible with the ordinary feelings of humanity. Present gain is the only object in view. The poachers' horizon is limited by the season's catch. Is it not an insult to common sense to deny that the pursuit of pregnant females and the slaughter of nursing mothers on their feeding grounds are wholly, absolutely, brutally inconsistent with any system that requires moderation, self-denial and humanity? Leaving out all other questions as irrelevant, is it not enough for the United States to say, "We can preserve for the benefit of the world the animal which your poachers are destroying; you can only do it by a prohibition of methods which you would not for an instant tolerate in analogous cases within your jurisdiction. Of what avail are small criticisms upon our system of protection when we are so largely concerned in carrying them to the point of the highest perfection?"

When suggestions are asked as to *any other way* of repressing or circumscribing this destructive slaughter, the British Commissioners propose as a remedy that Bering Sea be closed when sealing is unprofitable, and opened during the season when the horrors and the profits of the business both reach their climax. The language of the Counter Case of the United States, commenting upon this extraordinary suggestion, is couched in singularly moderate terms:

The recommendation by the Commissioners of a series of regulations such as those above considered, is clearly indicative of the bias and partisan spirit which appear in nearly every section of their Report (p. 128).

This subject is treated at length in the Counter Case (p. 125) and also in another part of this argument (*ante*. pp. 190-214); it need not be dwelt upon here.

In conclusion it is submitted, as the facts show that pelagic sealing by its very nature leads to and necessarily depends for success upon indiscriminate slaughter, that the females killed are with rare exceptions, either gravid or nursing mothers and form a large proportion of the pelagic catch; that the slaughter of a breeding female of necessity involves the destruction of the nursing pup at home as well as of the unborn fetus, thus destroying three animals at one blow; that the only practical and intelligent method of preserving the race is to stop pelagic sealing, leaving the United States to continue and to improve, if possible, those measures best calculated to secure an end which it is to the interest of both parties to reach. In other words, the experience of men has taught that the preservation of the breeding female was and is the only means of preserving and perpetuating the race. Until it has been shown that the animal does not share the conditions of other animals born and suckled on land, the usual means of preserving them must be adopted.

Unless these propositions are conceded, the hope of preserving the fur-seals of the Pribilof Islands must be abandoned. Present greed is not controlled by possibilities of remote loss. The South Sea seals and their fate have taught the world a lesson which the United States are seeking to improve in the common interest of mankind. They will succeed if this High Tribunal by its decision shall prevent practices repugnant to the growing humanity of the age.

The foregoing statement of facts has been prepared in part with the aid of a collated edition of the testimony presented with the Case of the United States, and which is herewith submitted to the Tribunal of Arbitration as an Appendix to the printed argument of counsel.

F. R. COUDEET.

SEVENTH.

POINTS IN REPLY TO THE BRITISH COUNTER CASE.

Since the preparation of the Argument on the part of the United States, on the facts as so far appearing, the British Counter Case has been delivered. It contains a large quantity of matter concerning the nature and habits of the fur-seals, the methods and characteristics of pelagic sealing, and the methods of dealing with the seals at the breeding places, which matter, so far as it is relevant at all, is relevant to the question of the alleged property interest and rights of defense of the United States, and to the regulations which may be necessary in order to prevent the extermination of the animal.

This matter is accompanied with a protest (page 3), that, so far as matter relevant only to the question of regulations is concerned, its introduction before the Arbitrators is at present improper, and that it has been incorporated into the Counter-Case without prejudice to the contention on the part of Great Britain; that the Arbitrators can not consider the question of regulations until they have adjudicated upon the five questions enumerated in Article VI of the treaty.

The counsel for the United States conceive that there is no ground upon which such an interpretation of the treaty can be supported. That interpretation assumes that there are to be two separate and distinct hearings and two separate and distinct submissions of proof. There is absolutely nothing in the treaty to warrant such a view. In the distinct provision respecting the Cases and Counter Cases, the contents, the times when they are to be submitted, the preparation of the arguments, the times when they are to be submitted, when the hearing is to begin, and when the matter is finally to be decided, all point to the conclusion that there is to be but one hearing, one submission of evidence, one argument, and one determination.

It is indeed contemplated by the treaty that in a certain contingency it may not be necessary for the Tribunal to consider the question of concurrent regulations. This, however, simply involves a condition exceedingly common in judicial controversies, that several questions

may be made the subject of trial at the same time, and yet the nature of the decision be such as to dispense with the necessity of determining all of them.

Assuming that the interpretation of the treaty insisted upon by the counsel of the United States is the correct one, the procedure adopted on the part of the British Government is wholly irregular and unauthorized, and the matter thus irregularly sought to be introduced before the Tribunal should be excluded from its view. Otherwise the Government of the United States would be placed under a disadvantage to which it should certainly not be subjected.

In the first place, all the testimony and proofs, which bear alone upon the question of regulations, would come before the Tribunal without any opportunity on the part of the United States for making an answer to it. No such possibility is contemplated by the treaty, nor should it be allowed. No proceeding is entitled to the name of a judicial one which allows one party to introduce proofs without giving to the other an opportunity to meet and contradict them.

There is another disadvantage scarcely less onerous: The government of Great Britain in thus waiting until the proofs of the United States had been offered secured to itself the very great and unjust advantage of obtaining a knowledge of its adversary's Case before committing itself to its own view. It was thus enabled to withhold evidence which it would otherwise have introduced, and to give evidence which it would otherwise have withheld. Such advantages at once destroy that equality between contesting parties which is a prime requisite of every judicial proceeding.

But matter bearing upon the question of property was, even in the view of the Government of Great Britain, relevant in the original Case, and any evidence or proofs which the Government of Great Britain desired to submit upon that point ought to have been embraced in their original Case. Manifestly, everything relating to the nature and habits of the seals is of this character. It is upon these that the question of property depends. All matter of this description, except such as plainly tends to impeach and was designed to impeach the evidence offered by the United States, should have been exhibited in the original Case, and should not be allowed to be introduced under cover of the Counter Case. Surely it can not be the privilege of Her Majesty's Government to so introduce its proofs as to deprive the United States of all opportunity either to answer or impeach them.

And the same circumstance which deprives the United States of its just right of answering by counteracting proofs the new matter contained in this Counter Case also deprives them of the ability to fully treat of such matter in argument. Entirely occupied as they are, and must necessarily be, in the final work of translating and carrying through the press the argument already prepared by them upon the original Cases, they have no time at their disposal in the short period between the delivery of the Counter Case and the time appointed for the submission of the arguments within which to carefully review and comment upon this new matter.

Even the evidence in respect of the claim for damages made by Great Britain is chiefly comprehended in the Counter Case, so that the United States Government has no opportunity to introduce counter proof, nor even to analyze in written argument the evidence so submitted.

The United States Government therefore protests against the consideration by the Arbitrators of any evidence or proofs which in their judgment should, under the true interpretation of the treaty, have been embraced in the original Case of Her Majesty's Government.

The only qualification of the unusual advantage which Her Majesty's Government would gain from the permission to lay before the Arbitrators allegations and proofs which the United States have had no opportunity to answer, comes from the circumstance that most of the new matter referred to is of so little materiality or of such small probative force, that the privilege of answering is of less importance than it would otherwise be. There is a failure everywhere in this last document, as there was in the principal Case of Great Britain (including as part of it the separate report of the British Commissioners), either squarely to assert any proposition vital to the merits of the controversy, or to attempt directly to maintain it by evidence or argument.

There are, aside from the matters relating to sovereignty and jurisdiction, several material questions in this controversy, substantially stated in the Case of the United States.

First. Do the Alaskan fur-seals, under the necessary physical conditions of their life, habitually so return to the Pribilof Islands and so submit themselves there to the control of the proprietors of those places as to enable the latter to make them the subjects of an important economical husbandry in substantially the same way and with the same benefits as in the case of domestic animals?

Second. Has the Government of the United States, the occupant

and proprietor of those islands, availed itself of this opportunity, and by wit, industry and self denial made these animals the subjects of such husbandry, and thereby furnished to commerce and the world the benefits of the product, at the same time preserving the stock?

Third. Do not these facts, under the circumstances proved, give to the United States Government, upon the just principles applicable to the case, and in accordance with the general usage of nations in similar instances, such a right of property in the seal herd and the husbandry thus based upon it as entitles that Government to protect it from destruction, at the times and in the manner complained of?

Fourth. Even if it were possible to conceive that this right of property, unquestioned so long as the seal herd remains within the territorial waters of the United States, is suspended as to each and any individual seal as soon and so long as it can be found outside the territorial line, however temporarily, and with whatever intention of returning, are individuals of another nation then entitled to destroy such animals for the sake of private gain, if it is made clearly to appear that such destruction is fatal or even largely injurious to the important material interest of the United States Government so established and maintained upon its territory, for the benefit of itself, its people, and mankind? More especially if the manner of such destruction is in itself so barbarous and inhuman that it is prohibited in all places where civilized municipal law prevails? Is such conduct a part of the just freedom of the sea?

Fifth. Is any practicable husbandry possible in pelagic sealing, or is not that pursuit essentially and necessarily destructive to that interest, and certain, if engaged in to any considerable extent, to result in the loss, commercially speaking, of the animal to the world?

Who will say that Her Majesty's Government, in its principal Case, or in its Counter Case, takes a square attitude upon either of these questions? Who will say that it squarely negatives either of the two first or affirms the last of these questions, as matters of fact, or meets with any satisfactory answer, either upon principle or authority, the propositions of the other two?

What, then, is the character of this Counter Case, so far as respects the matter referred to? It seems to consist in great part of desultory observations, suggestions, and conjectures, probable or improbable, upon immaterial points; or, where the points are material, the matter is vague and indefinite, and the proofs slight, often inconsistent, and

everywhere unsatisfactory. Observations made in one place are qualified in another, contradicted in another, and perhaps reasserted in another. To follow such a line of discussion with minute criticism would be an endless task, and when it was concluded it would be found to be nearly useless. The best method of dealing with such a sort of contention will be to briefly state the *points* to which it seems to be directed, and to offer such observations upon these and the matters relating to them as seem most pertinent.

First. Considerable importance seems to be assigned to the point whether seals are more aquatic than terrestrial in their nature, and surprise is expressed that they should be viewed, in the case of the United States, as being very largely land animals.

But whether they are principally aquatic or terrestrial is of little importance. It is certain that they are amphibious, and that they live sometimes upon the land and sometimes in the sea. The only important question is whether they have those qualities, which, under the principles upon which the law of property rests, make them property, or render it expedient that an industry established by the United States in respect to them should be protected by a prohibition of slaughter upon the high seas.

Second. Much stress is also laid upon the question whether coition may be had in the water. Of what consequence is this? We know it is a fact that it is had principally, if not exclusively, on the land, to an extent which in its circumstances forms the most prominent distinctive and controlling feature in the habits and movements of the fur-seal. The births certainly take place upon the land, and it is there that the young are nourished and brought up.

Third. A good deal in the way of conjecture is stated and sought to be supported, to the effect that the seals may have had, in times of which we know nothing, other breeding places, of which we know nothing; and may again be driven to other haunts. It is not perceived that these conjectures are in any manner relevant. They are purely conjectures, and were they determined one way or another, it would not matter. What we are dealing with is an animal which has had uniform habits ever since anything has been known about it; and the only reasonable conjecture which we can make is, if it were of importance to make any, that it will continue to have, in the future, the same habits, as under the same circumstances it has had in the past.

Fourth. In the report of the British Commissioners, submitted with

the original Case, it was in substance admitted that the Alaskan herd was entirely separate and distinct from the herd on the opposite side of the Pacific Ocean. A good deal of matter is set forth in the Counter Case tending to support the opposite notion, that the members of these different herds commingle.

It is enough to say in answer to all this, that the utmost which is asserted is *mere* conjecture, and as such should be dismissed as wholly unworthy of consideration. Surely this Tribunal will find other grounds than conjecture upon which to base its decision. And besides, the absence of any commingling between the herds worthy of consideration is fully proved by the evidence.

It is suggested in the Counter Case that the distinctive features which the Alaskan herd exhibits are probably those only which are due to a long residence under peculiar geographical conditions. Let this be conceded. How otherwise could they be denied? Upon the speculative question whether these different herds of seal are of different species or not, or whether they were once derived from a common stock, we are at liberty to amuse ourselves with such conjectures as may please us. It is of no importance how the Alaskan herd acquires its distinctive physical peculiarities, if they have actually been acquired so that they can be distinguished from others, and of this the testimony of the furriers, to go no further, is conclusive.

But what if it were *proved* even that the herds did commingle? It is not perceived that this would be of any material consequence. Would it be for this reason any the less a crime against the law of nature to destroy them? Would it be any the less important that the seals should be regarded generally as property or any the less important that such regulations should be adopted as would prevent their extermination?

Fifth. It is again insisted, as it was in the report of the British Commissioners, that it is not proved that the females go long distances from the breeding places into the sea to seek for food while they are nourishing their young. But in the face of the evidence that the females actually do go into the water universally, that they are destroyed there in large numbers, and that they have in numerous instances been found and killed by pelagic sealers at long distances from the shore with their breasts filled with milk, how can it be suggested, with any expectation of belief, that the fact is not proved? For what purpose *do* the females resort to the water? What is the

object of their distant excursions into Bering sea, where they have been known to be? Is it not reasonable to suppose that nursing mothers require nourishment? And how else are the young supported?

But here, again, suppose it were true that these excursions were not made for the purpose of food. They are yet *made*, and the danger of their being slaughtered by pelagic sealers is as great as if the object of their excursions were food.

Sixth. Much space is devoted in this Counter Case to the subject of the frequent finding of numerous dead pups; and here also conjecture is abundantly resorted to. It is suggested that they may have been killed by disease, or by the rush of other seals over them, or by the waves of the sea, or by their mothers having been killed by being driven to the hauling grounds and thus injured and prevented from finding their way back to their young. But to what purpose is it to suggest that a great variety of things may have happened, of no one of which any proof is given? Doubtless it is true that some of the young die from a variety of causes of which we know nothing, as is the case with all animals. The question is, whether the slaughter of their mothers by pelagic sealing is not a cause, and the principal cause of this mortality. When we know that the mothers do habitually resort to the sea, where they are killed in great numbers, when we know that they have often been killed at long distances from the shore with their breasts distended with milk, when we know that suckling is the natural and only mode of nourishment to the young, and when we know that a number of the pups dead upon the islands are extremely emaciated, and exhibit all the appearances of having died in consequence of the loss of nourishment, the conclusion seems plain enough that their mothers have been killed at sea and they starved in consequence and no amount of conjecture can displace it.

Seventh. It is said by way of argument against the allegation of a property interest that the seals, although they return to the same general breeding place, do not always return to the same *island* or to the *same place* upon the same island. This may or may not be true; but of what importance is it, when it appears that all the islands ever have been, now are, and are likely to continue to be the property of one proprietor, the United States Government? And if it were otherwise, if there were many different proprietors of the different islands and of different places on the same islands, of what consequence would it be

upon the general questions of property interest or what regulations were necessary in order to preserve the herd?

All the points above enumerated, made by the British Counter Case, are, it is conceived, essentially immaterial. They might be decided the one way or the other without touching the merits of the real question of the controversy. In saying this, however, we by no means intend to intimate that anything is contained in this Counter Case, by way of evidence, which in any way modifies or weakens the proofs which the United States have in their principal Case adduced to support the positions taken by them.

There are, however, some points which the Counter Case deals with which are of greater importance; but in respect to these, although the points themselves are material, the new evidence which is brought forward or the new views which are suggested are not perceived to be material. Some brief observations should be bestowed upon them.

First. Pelagic sealing is again defended, but how is it defended? Is it denied that it is in its nature destructive as involving the killing of females to a much greater extent than males? Is it denied that the greater part of these females are either pregnant or nursing, and sometimes both? Is it denied that a great many victims are killed and wounded which are never recovered? Is it denied that many young perish on account of the death of the mothers? There is no denial upon either of these points. What then is asserted or suggested in the Counter-Case? Simply that the statements upon this subject are exaggerated.

It would enable counsel for the United States to better answer any position taken on the part of the Government of Great Britain upon these points if the counsel for the latter would commit themselves to some definite proposition or assertion, but this is carefully avoided by them. They say, indeed, that the statements upon this head are exaggerated; but *whose* statements are exaggerated? And *how much* are they exaggerated? The evidence given in the Case of the United States in great abundance shows that from 75 to 90 per cent of the entire pelagic catch is composed of females. If it be this which it is insisted on the part of Great Britain is an exaggerated statement, then how much is it exaggerated? Is it exaggerated 5, or 10, or 20, or 40, or 50 per cent? What, according to the best information obtainable by the counsel for Great Britain, is the most reasonable statement of the proportion of females in the pelagic catch? They give us no infor-

mation upon these points. They offer no estimate; and if we recur to the proofs contained in the depositions which are given, we are still worse off. These vary from 5 to 80 per cent. Most of them, those that place the amount at less than half, every one can see must be false. For what purposes are such proofs presented? Is it expected that they will be believed to be true? It will perhaps be suggested that the truth may be found by taking an average of these inconsistent statements. Such a course has been pursued on the part of the Government of Great Britain upon the point of how many seals are killed or wounded that are never recovered; but the method of endeavoring to obtain the truth by taking an average of lies seems to be open to question.

Upon this whole matter the counsel for the United States will content themselves by offering the following summary of considerations:

I. The assertion in the Case of the United States is, that the proportion of females in the pelagic catch is at least 75 per cent. The reasonableness of this is supported in multiform ways.

(1) It is nowhere *denied* in the report of the Commissioners on the part of Great Britain, nor even in the British Counter Case.

(2) Upon any fair construction of the answer of one party to the allegation of another, it must be taken as *admitted*. The admission is reluctantly made in the British Commissioners' Report and in the British Counter Case also that a "considerable proportion" of the pelagic catch consists of females. What does a "considerable proportion" mean? Five per cent., or 10 per cent., or 20, or 50, or 75, or 80? The language is sufficiently broad and indefinite to cover either of the proportions named, and, as the assertion made on the part of the United States is not denied, the admission in question must be taken to be an admission of the fact *substantially* as asserted on the part of the United States.

(3) The proofs adduced by the United States from persons engaged in pelagic sealing or with definite knowledge of it, overwhelmingly support the assertion.

(4) The proofs contained in the British Counter Case also support it. They are the statements of the pelagic sealers themselves, a class of witnesses in the highest degree interested and not very much to be depended upon. They must be taken most strongly against the parties making them. And excluding those that are manifestly false, we find enough remaining to fully support the con-

tention of the United States. Among these witnesses there are a large number who place the proportion of females in the catches made by them, respectively, higher than 60 per cent.

(5) But the proof furnished by the furriers is absolutely decisive, and this makes the proportion fully equal to the assertion by the United States.

(6) If we look at the probabilities of the case, no assertion in opposition to the contention of the United States could be entertained for a moment. When we consider that the female at sea is, as a general rule, more easily approached, and therefore more easily secured, than the male, and that the number of breeding females is, as compared with the breeding males probably twenty to one, how is it possible that the slaughter of the females should not embrace anywhere from three-fourths to four-fifths of the entire catch? If indeed, we could credit the assertion continually put forward in the report of the British Commissioners and in the British Counter Case, that there has been for years on the Pribilof Islands an excessive slaughter of young males, and that thus the number of breeding males has been very much reduced, so as to make the harems three and four times as large as they formerly were, the excess of females over males would be vastly multiplied, and the wonder would almost be how any breeding male should ever be killed.

II. Considerable attention is given to an attempt to controvert the position of the United States, that a large number of seals struck by pelagic sealers are lost without being recovered. Of course the United States have had no opportunity to controvert the proofs presented upon this point in the British Counter Case. They contain no evidence except that of pelagic sealers, and this must be taken most strongly against them. Upon this point the reasonable and probable inferences from incontestible facts are of greater weight than the loose and suspicious statements of the witnesses referred to. We know that when a seal is killed he sinks at once, because his specific gravity is greater than that of the water, although he may sink more quickly in some instances than others. We also know that when a seal is wounded, but not killed, he has great capacity to escape the pursuer. We know that skill in shooting and skill in recovery must vary very much among different men. Under these circumstances, it is not reasonable to believe that half the seals fatally wounded are secured.

III. Further attention is given to alleged mismanagement of the seal herd upon the Pribilof Islands. Little or nothing new in the way of evidence is offered upon the subject, but the assertions contained in the British Commissioners' report are repeated and enlarged. The points on which particulars of this alleged mismanagement are stated are: (1) the excessive killing of young males; (2) injuries committed by what is called "overdriving"; (3) raids upon the islands.

(1) Concerning the excessive slaughter of the young males, there is no trustworthy evidence than an annual draft of 100,000 was, before any injury effected by pelagic sealing, excessive. It is undoubtedly true that such a draft upon the islands, coupled with any considerable amount of captures at sea, would be excessive, and consequently we find that after pelagic sealing had reached considerable proportions it became increasingly difficult to make the annual draft of the 100,000 upon the islands, which difficulty increased to such an extent that in 1890 it was arrested by the action of the agent of the United States Government. If at that time, or prior to that time, the extent of pelagic sealing had been known and its effects upon the herd ascertainable, action would have sooner taken place to restrict the killing upon the islands. In this suggestion the damages occasioned by pelagic sealing are insisted on as its defense.

(2) In respect to over-driving, no proofs are submitted which furnishes any considerable support to the assertion. It is undoubtedly true that from the very nature of the case there may be more or less seals included in the drives unfit, by reason of being females or otherwise, for slaughter. These are allowed to drop out to regain the herd. The business of driving may be, if negligently conducted, trying and injurious to the subjects of it, but it is not necessarily so in any considerable degree. There is no proof worthy of attention that it is so negligent. The interest of those engaged in it is largely the other way. And the evidence that it is well conducted is ample.

(3) Upon the Islands it is to be said that undoubtedly there have been in the past, and may be in the future, attempts, some times successful on the part of marauders, to take seals by night. But of what consequence is this to the argument? Does it show anything more than that there ought to be kept an adequate guard? And certainly we know that it is in the interest of the proprietors

to keep one. What self-interest will not move men to do, they will not do from any other motive? But whence do these raids come? From the very sealing vessels engaged in pelagic sealing. That is one of the mischiefs of that pursuit.

(4) Touching the allegations of mismanagement upon the islands, embracing the three forms of possible injury to the seals which have been mentioned, there is this to be said: they may possibly occur in consequence of carelessness or neglect; but every motive and every interest stimulates the United States as well as their lessees, to make the evils as small as possible.

And concerning the extent to which these evils exist, the conclusion must be formed upon the statements of actual witnesses, and not upon lectures or articles in newspapers based by the writers we do not know upon what evidence or whether upon any evidence at all.

(5) But what is the point supposed to be established or supported by this matter concerning mismanagement upon the islands? What is the object for which it was introduced? What conclusion would it justify if the assertions were proved to their fullest extent? Do they show that pelagic sealing is any less mischievous? Do they show that in that form of sealing males are taken and not females? Do they show that in that form of sealing a great many are not wounded and crippled that are never recovered? Do they show that in administering a herd of such animals on the land females should be slaughtered and not males? Do they show, or are they intended to show, that the United States has not adopted methods grounded upon the right principles? Do they show or are they intended to show, that a different set of proprietors than the United States would attend to the business in a better and more economical manner and with better methods? If so, what sort of proprietors should they be? What scheme of administration should be followed? How should the selections for slaughter be made? Answers to these questions would be extremely pertinent, but none seem to have been suggested.

(6) The report of the British Commissioners more than intimated, although quite inconsistently with admissions made by them, that the capture of seals upon the land was an error, and that the ideal mode of dealing with this animal was to confine the pursuit to the sea. The Counter Case on the part of Great Britain does not avow

this proposition. Is it the intention on the part of the Government of Great Britain to support that view? If so, some intimation to that effect would have been extremely pertinent in this Counter Case.

And when that view comes to be supported, if at all, it is to be hoped that those who advocate it will take into consideration and give satisfactory explanations upon the following points:

(a) What man of science, familiar with the races of animals and the causes which tend to their destruction or their preservation, entertains a like view? What man acquainted with the business of practical husbandry and dealing for profit with a race of animals polygamous in its nature, thinks it wise to slaughter males and females indiscriminately for the market, or rather, to make their selections for slaughter consist in the proportion of 75 per cent of females.

(b) Is it likely that any better provision for the preservation of the race of fur-seals can be suggested than that which assigns the rewards of preservation to those who alone have the ability and the disposition to exercise the best methods of preservation? Is the method which has preserved in undiminished numbers for one hundred years and upwards the herd of seals resorting to the Commander Islands, a mistake, and is the same method which has been pursued for nearly the same period on the Pribilof Islands, and with the same effect until the ravages made by pelagic sealing were committed, also a mistake? And wherein is there any essential difference between the methods pursued on the two groups of islands?

And, finally, were it even admitted that the United States Government mismanages its own business to the detriment of its own interests, would that destroy its right of property in the business? Or deprive it of the right of self-defense? Or justify a slaughter by the poachers which would otherwise be unjustifiable? Or even render it probable that such mismanagement would not be corrected by experience?

It is worthy of remark, in conclusion, upon the subject of regulations, so largely dealt with in the British Counter Case—

1. That while it is now professed on the part of Great Britain that Her Majesty's Government is willing that just regulations for the preservation of the fur-seal should be adopted, it is solely owing to the refusal

of that government to consent to any such regulations, on account of the objections of Canada, that this controversy has arisen and this arbitration has been rendered necessary. The attitude of Canada on this subject plainly shows that it quite well understands that any regulations adopted for the preservation of the seal which would be at all adequate for that purpose must substantially, if not entirely, put an end to pelagic sealing. The object of the adventurers, which that Province thinks it right to protect, is simply to make what profit is to be derived out of the destruction of the fur-seals in the few years required for its completion.

2. In the British Counter Case, every objection possible to be brought forward to the making or enforcing of any regulations, is insisted on. The real position assumed is that of opposition to any regulations that would be of sufficient value to be worth adopting. Those proposed by the British Commissioners are for the benefit of pelagic sealing and an enhancement of its profits, and its consequent destruction by restricting the unquestioned right of the United States to take the seals on its own territory. In answer to the proved charge that pelagic sealing conduces to the inevitable extermination which it has produced everywhere else, and that the methods employed by the United States Government tend to the preservation of the animal while making its product available to the world, it is gravely proposed by the British Commissioners to adopt regulations which would diminish that use which is consistent with the protection of the seal, and which is not called in question by the treaty, so as to increase the use which is destructive; and to add to the losses already suffered by the United States in its territorial interest, by increasing the profits of those who are engaged in destroying it. It is difficult to deal seriously with such proposals.

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